79-278

No.

In the Supreme Court of the United States

OCTOBER TERM, 1978

LAWRENCE CONNELL, CHAIRMAN OF THE NATIONAL CREDIT UNION ADMINISTRATION BOARD, ET AL., PETITIONERS

v.

AMERICAN BANKERS ASSOCIATION, ET AL.

FEDERAL HOME LOAN BANK BOARD, ET AL., PETITIONERS

v.

INDEPENDENT BANKERS ASSOCIATION OF AMERICA

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, ET AL., PETITIONERS

v.

UNITED STATES LEAGUE OF SAVINGS ASSOCIATIONS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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INDEX

CITATIONS

Cases:

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BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, ET AL., PETITIONERS

v.

UNITED STATES LEAGUE OF SAVINGS ASSOCIATIONS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the National Credit Union Administration, the Federal Home Loan Bank Board, and the other federal defendants,[1] petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in these cases.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-7a) is not reported. The opinion of the district court in *United States League of Savings Associations* (App. C, *infra*, 9a-31a) is reported at 463 F. Supp. 342. The opinion of the district court in *American Bankers Association* (App. D, *infra*, 32a-41a) is reported at 447 F. Supp. 296. The opinion of the district court in *Independent Bankers Association of America* (App. E, *infra*, 42a-50a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 20, 1979. A petition for rehearing in one of the consolidated cases (*Independent Bankers Association of America*) was denied on May 21, 1979 (App. B, *infra*, 8a). On July 12, 1979, the Chief Justice extended the time in which to file a petition for a writ of certiorari to and including August 20, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] The other federal defendants include individual members of the petitioner agencies, sued in their official capacities.

QUESTIONS PRESENTED

1. Whether regulations promulgated by the Federal Reserve Board and the Federal Deposit Insurance Corporation to permit depositors in federally-insured banks to make pre-arranged, automatic transfers of funds from savings accounts to demand deposit accounts in order to cover checks drawn by depositors or to maintain a specified balance in demand accounts are valid.

2. Whether regulations promulgated by the National Credit Union Administration to permit members of federal credit unions to withdraw funds from their accounts by means of a draft are valid.

3. Whether regulations promulgated by the Federal Home Loan Bank Board authorizing federal savings and loan associations to establish off-premises computer terminals through which they can render financial services to their accountholders are valid.

STATUTES AND REGULATIONS INVOLVED

The pertinent statutes and regulations are set forth in Appendix F, *infra*, 51a-70a.

STATEMENT

1. The Federal Reserve Board supervises and regulates commercial banks that are members of the Federal Reserve System pursuant to the provisions

of the Federal Reserve Act, 12 U.S.C. 221 *et seq.* The Federal Deposit Insurance Corporation (FDIC) regulates and supervises those federally-insured commercial banks that are not members of the Federal Reserve System under the Federal Deposit Insurance Act, 12 U.S.C. 1811 *et seq.* The National Credit Union Administration (NCUA) supervises and regulates federal credit unions chartered under the Federal Credit Union Act, 12 U.S.C. 1751 *et seq.* The Federal Home Loan Bank Board (FHLBB) supervises and regulates federal savings and loan associations under the Home Owners' Loan Act, 12 U.S.C. 1461 *et seq.*

Each of these agencies, acting under separate statutory authority conferred by Congress, has promulgated regulations authorizing the financial institutions that it supervises to adopt new methods for the transfer or withdrawal of deposited funds. Specifically, on December 8, 1977, the NCUA promulgated a regulation (42 Fed. Reg. 61977 (1977); App. F, *infra*, 66a-70a) which authorizes federal credit unions to adopt share draft programs that enable members to withdraw funds from their share accounts for payment to themselves or to third parties by means of a draft drawn on the credit union and payable through a bank. On May 1 and May 5, 1978, the Federal Reserve Board and the FDIC adopted amendments to their regulations (43 Fed. Reg. 20001 (1978), 20222 (1978); App. F, *infra*, 57a-59a) that enable depositors at FDIC insured banks to make prearranged, automatic transfers of funds from savings

to demand (checking) accounts to cover checks drawn by depositors or to maintain a specified balance in their demand accounts. On May 24, 1978, the FHLBB adopted a regulation (43 Fed. Reg. 22930 (1978); App. F, *infra*, 59a-66a) authorizing federal savings and loan associations to establish "remote service units"—off-premises computer terminals through which associations can render various financial services, including funds withdrawal, for their customers.

2. In three separate lawsuits, the regulations of the four agencies were challenged by a trade association of financial institutions that competed with the financial institutions subject to the regulations. The plaintiffs in *United States League of Savings Associations* challenged the regulations of the Federal Reserve Board and FDIC authorizing automatic funds transfers by commercial banks. The plaintiffs in *American Bankers Association* challenged the regulations of NCUA authorizing the use of share drafts by credit unions. And the plaintiffs in *Independent Bankers Association of America* challenged the regulations of the FHLBB authorizing savings and loan associations to establish remote service units. The complaint in each case alleged that the challenged regulations violated statutory provisions applicable to the particular agency or exceeded the agency's rule-making authority.

a. The complaint in *United States League of Savings Associations* charged that the automatic funds transfer (AFT) service authorized by the Federal Reserve Board and FDIC violates the statu-

tory prohibition against payment of interest on demand deposits (12 U.S.C. 371a and 1828(g)) and also permits withdrawal of funds by negotiable instrument from interest bearing accounts for payment to third parties, in violation of 12 U.S.C. 1832(a). The district court granted summary judgment in favor of the Federal Reserve Board and FDIC (App. C, *infra*, 9a-31a). The court pointed out that the automatic funds transfer service permitted by the challenged regulations requires the existence of both a savings deposit account and a demand deposit account. Under such a service, interest is payable only on the savings account, and negotiable instruments can be used only to withdraw funds from the demand account. Referring to the requirement in the challenged regulations that any AFT service must preserve the traditional right of the commercial bank to require 30 days' notice from a depositor before money may be withdrawn from the depositor's savings account and transferred to his demand account, the court emphasized that the "two accounts are distinguished not solely by the payment of interest but more significantly by the limitation of the right of withdrawal from savings accounts" (*id.* at 26a). The court also noted that, under the challenged regulations, the bank's right of 30 days' notice prior to withdrawal must specifically be brought to the attention of depositors(*ibid.*).

On similar grounds, the district court rejected the contention that the AFT regulations violate the statutory prohibition against withdrawals by negotiable

instrument from savings accounts for payment to third parties. The court again stressed that "[t]wo accounts are required to operate the AFT service" (App. C, *infra*, 27a) and that "no negotiable orders are drawn on or third party payment made from the savings deposit" (*ibid.*). The court also observed that the contested service is legally indistinguishable from other authorized and unchallenged procedures for withdrawal or transfer of funds from interest bearing accounts, such as "bill payer" and "telephone transfer" services (*id.* at 27a-28a).

b. The complaint in *American Bankers Association* charged that the NCUA's regulations authorizing the use of share drafts by federal credit unions are invalid because such powers are not extended to credit unions by the Federal Credit Union Act, 12 U.S.C. 1751, *et seq.* The district court granted summary judgment in favor of the NCUA, finding that nothing in the Federal Credit Union Act or its legislative history supported the view that federally chartered credit unions may not use this method of funds withdrawal. The court noted that "[s]hare drafts are simply a variation on established methods of accessing members' accounts, similar to previous procedures for credit union third-party payments, and similarly valid as part of the exercise of FCU's incidental powers under the FCU Act" (App. D, *infra*, 37a).

c. The complaint in *Independent Bankers Association of America* charged that the regulations of the FHLBB authorizing savings and loan associations to

use remote service units (RSUs) exceed the Board's authority under Section 5(a) of the Home Owners' Loan Act, 12 U.S.C. 1464(a), and amount to permission to use check withdrawals from savings accounts, in violation of 12 U.S.C. 1464(b). The district court rejected this contention. After noting that "RSUs are merely an improvement upon traditional methods whereby members may access their FSL accounts" and that "RSU activity is in no way inconsistent with past practices of FSLs or with the purpose for which FLSs were created," the court held that "RSU activity serves the basic purposes of FSLs, that the decision to implement such activity is within the special expertise of the Board, and that in allowing the utilization of RSUs the Board has not exceeded the scope of its authority under Section 5(a) of the HOLA" (App. E, *infra*, 47a-48a). The court also rejected the argument that use of remote service units is the "functional equivalent" of permitting the depositor to transfer funds from his savings account by negotiable instrument, observing that such rough "equivalence" arguments are properly addressed to Congress, not the courts (*id.* at 49a-50a).

3. Less than a month after hearing arguments in the three cases, the court of appeals issued a brief *per curiam* judgment order, in which it reversed the three separate decisions of the district court and held invalid the regulations of each administrative agency. Without discussing the separate statutory provisions and legislative history involved in each case, the court concluded in general terms that "[i]t appears

to the court that the development of fund transfers as now utilized by each type of financial institution involved herein, commercial banks with 'Automatic Fund Transfers,' savings and loan associations with 'Remote Service Units,' and federal credit unions with 'Share Drafts,' in each instance represents the use of a device or technique which was not and is not authorized by the relevant statutes, although permitted by regulations of the respective institutions' regulatory agencies" (App. A, *infra*, 2a-3a). Without elaboration of its rationale, the court held that the automatic funds transfer service is illegal because it permits banks to pay interest on demand deposits and also permits withdrawals from savings accounts by negotiable instruments for the purpose of making transfers to third parties; that the maintenance of remote service units by savings and loan associations amounts to a violation of the prohibition against use of checking accounts by such institutions; and that share drafts used by federal credit unions are the "practical equivalent" of checks drawn on interest-bearing time deposits in violation of the Federal Credit Union Act (*id.* at 3a-4a).

The court of appeals also expressed the view that "the methods of transfer authorized by the agency regulations have outpaced the methods and technology of fund transfer authorized by existing statutes" (App. A, *infra*, 4a-5a). It added (*id.* at 4a):

> The history of the development of these modern transfer techniques reveals each type of financial institution securing the permission of its ap-

> propriate regulatory agency to install these devices in order to gain a competitive advantage, or at least competitive equality, with financial institutions of a different type in its services offered the public. The net result has been that three separate and distinct types of financial institutions created by Congressional enactment to serve different public needs have now become, or are rapidly becoming, three separate but homogeneous types of financial institutions offering virtually identical services to the public, all without the benefit of Congressional consideration and statutory enactment.

Although the court of appeals ruled that the regulations of each of the four agencies are invalid, it "recognize[d] that the wisdom of the transfer procedures permitted by the regulations of the several agencies is a matter of high public financial policy, involving the financial interests not only of the parties before this court in these proceedings, but also of other large groups in the nation," and that "[i]t is the responsibility of the Congress and not the courts to determine such policy" (App. A, *infra*, 6a). The court therefore stayed the effective date of its ruling "until 1 January 1980 in the expectation that the Congress will declare its will upon these matters" (*id.* at 7a).

REASONS FOR GRANTING THE PETITION

1. This case presents issues of substantial public importance. The decision of the court of appeals seriously curtails the regulatory authority of four administrative agencies vested by Congress with primary responsibility for supervising the nation's principal financial institutions. In addition, the impact of the decision on the financial community and the general public is both certain and significant. As the court of appeals recognized, "enormous investments have been made by various financial institutions in the installation of new technology [and] * * * methods of financial operation in the nation have rapidly grown to rely on much of this" (App. A, *infra*, 5a). The court also correctly noted that "a disruption of the offered services would necessarily have a deleterious impact on the financial community as a whole * * *" (*ibid.*).

It is estimated by the Federal Reserve Board and FDIC that, as of July 1979, depositors held over $7.1 billion in bank accounts participating in automatic funds transfer programs. Similarly, the National Credit Union Administration estimates that member institutions now hold more than $783 million in federal credit union share draft accounts. The Federal Home Loan Bank Board estimates that federal savings and loan associations operate more than 2,700 remote service units and that over $2.6 billion is held in savings accounts accessible through RSUs.

Although the court of appeals believed that new legislation is required to permit automatic funds transfer, remote service unit, and share draft services, the court provided no analysis to show that the administrative agencies had erred in concluding that existing legislation provides a sufficient basis for these services or that the district court had miscon-

strued the separate statutory provisions and their pertinent legislative histories. This broad-brush approach conflicts with the deliberate congressional plan to regulate different financial institutions under separate statutory schemes.

Nor was the court of appeals warranted in indulging its own policy view that the financial institutions here in question have extended their operations beyond their proper scope. Under well established principles, the court should have deferred to the reasonable interpretations of the administrative agencies charged by Congress with the supervision of those institutions and the enforcement of the statutes delineating the scope of their activities. See *Board of Governors of the Federal Reserve System* v. *First Lincolnwood Corp.*, No. 77-832 (Dec. 11, 1978), slip op. 13-14; *Mourning* v. *Family Publications Service, Inc.*, 411 U.S. 356, 369 (1973); *Board of Governors of the Federal Reserve System* v. *Agnew*, 329 U.S. 441, 449-451 (Rutledge and Frankfurter, JJ., concurring); see also *Zenith Radio Corp.* v. *United States*, 437 U.S. 443, 450-451 (1978); *Miller* v. *Youakim*, No. 77-742 (Feb. 22, 1979), slip op. 18-19.

Because the court of appeals invalidated these regulations on a nation-wide basis, no conflict among the circuits will emerge in the future. Hence, unless reviewed by this Court or corrected by new legislation (see note 5, *infra*), the decision of the court below will effectively nullify the regulations of four administrative agencies and put an end to services that have proved to be both efficient for financial institutions and beneficial to large numbers of the general public.

2. Contrary to the conclusion of the court of appeals, each of the regulations challenged in this litigation comports with the statute under which it was promulgated.

a. ***United States League of Savings Associations* v. *Board of Governors of the Federal Reserve System***

Congress has conferred upon the Federal Reserve Board and the FDIC extensive authority to define the terms "savings deposits," "demand deposits," and "interest," and to regulate withdrawal of savings deposits, payment of interest on deposits, and the maintenance of required bank reserves. 12 U.S.C. 371b, 461, and 1828(g).

The court of appeals nonetheless concluded that the regulations of the Federal Reserve Board and the FDIC authorizing automatic funds transfers exceed the congressional grant of authority. In the court's view, automatic funds transfers permit indirect payment of interest on demand deposits, in violation of 12 U.S.C. 371a and 1828(g), and also permit withdrawal of funds from savings accounts by negotiable instrument, in violation of 12 U.S.C. 1832(a).

As the district court noted (App. C, *infra*, 26a-28a), however, the AFT service requires the existence of two separate accounts—a savings account and a demand deposit (or checking) account. The regulations in question preserve the traditional distinction between the two accounts. Under the regulations, banks

are required to reserve their right to a 30-day notice from customers before transferring funds from a savings account to a checking account.[2] Interest is paid only on funds that actually remain in the savings account. The moment funds are transferred to the checking account, interest payments cease. Thus, interest is not paid on demand deposits in violation of 12 U.S.C. 371a and 1828(g). The automatic funds transfer service merely achieves in an efficient way what any person maintaining both a savings and checking account is free to do: transfer funds from the savings account to the checking account when convenient or necessary.[3]

Nor is there substance to the court of appeals' conclusion that automatic funds transfer services permit bank customers to draw negotiable checks on savings accounts for payment to third parties. Under the regulations, the order to withdraw funds from a savings account is part of the non-negotiable agreement between the bank and its depositor. The funds withdrawn from the depositor's savings account are simply transferred by the bank to the depositor's own non-interest bearing demand deposit account, not to

[2] As the district court pointed out, the 30-day notice feature of a savings account has been the basis for distinguishing between savings and demand deposit accounts since Congress enacted the Federal Reserve Act in 1913 (App. C, *infra*, 15a-17a).

[3] Commonly used methods for withdrawing funds from savings acounts for deposit in demand accounts include directions from the depositor in person, by telephone, by bill-payer service, or by fiduciary arrangement.

a third party. The only negotiable instruments (checks) involved are those drawn by the customer on his demand deposit account, not on his savings account. Only after funds are transferred to the demand account can they be used for payment by check to third parties. Thus, the AFT service does not permit transfer of savings deposits by negotiable instrument in violation of the statute.[4]

b. *American Bankers Association* v. *Connell*

Although the Federal Credit Union Act provides the authority for federal credit unions to accept member funds (12 U.S.C. 1757(6)), the Act and its legislative history are silent with respect to the procedures to be followed in withdrawing funds from a member's share account. However, federal credit unions are specifically empowered to make contracts with their members (12 U.S.C. 1757(1)), and to "exercise such incidental powers as shall be necessary or requisite to enable it to carry on effectively the business" of a credit union (12 U.S.C. 1757(15)). Moreover, the NCUA is vested with broad authority to promulgate rules deemed to be necessary or appro-

[4] Significantly, Congress has recently reviewed automatic funds transfer services provided by financial institutions and has adopted measures that accommodate those services. See the Financial Institutions Regulatory and Interest Rate Control Act of 1978, 92 Stat. 3641, 3729, 3713-3714, and 3645. Thus, Congress has been aware of the banking practices in question but has not disapproved the administrative construction. See *Board of Governors of the Federal Reserve System* v. *First Lincolnwood Corp.*, *supra*, slip op. 13-14; *Saxbe* v. *Bustos*, 419 U.S. 65, 74 (1974).

priate to implement the provisions of the Act (12 U.S.C. 1766(a), 1789(a)(11)). These provisions provide a sufficient statutory basis for the NCUA's share draft regulation.

Federally chartered credit unions have traditionally adopted procedures to afford customers convenient access to funds in their accounts and convenient mechanisms to transfer funds to third parties, including pre-authorized payments of recurring bills and telephone bill-paying services. By permitting the use of share drafts, the NCUA has merely provided an additional convenient method for withdrawing funds. The fact that share drafts are similar to checks is legally irrelevant. Contrary to the court of appeals' assumption, nothing in the Federal Credit Union Act or any other statute prohibits federally chartered credit unions from using checks or check-like instruments to facilitate customer withdrawals or payments to third parties.

Use of share drafts makes it possible for credit unions to participate in the benefits of the new technology of electronic funds transfer. By making access to funds more convenient, credit unions are better able to attract deposits and serve their members. And, in keeping with the goal of electronic funds transfer programs, share drafts minimize the flow of commercial paper because paid share drafts, unlike paid checks, are not returned to credit union members. Under these circumstances, the district court correctly concluded that the use of share drafts

was a proper incident of the business of federally chartered credit unions. See generally *Arnold Tours, Inc.* v. *Camp*, 472 F.2d 427, 432 (1st Cir. 1972).

c. ***Independent Bankers Association* v. *Federal Home Loan Bank Board***

Section 5(b)(1) of the Home Owners' Loan Act, 12 U.S.C. 1464(b)(1), provides that accounts at federal savings and loan associations "shall not be subject to check or to withdrawal or transfer on negotiable or transferable order or authorization to the association, but the Board may by regulation provide for withdrawal or transfer of savings accounts upon non-transferable order or authorization." Remote service units fully comply with the express terms of the statute since they do not subject funds in savings accounts to transfer by "check" or to "withdrawal or transfer on negotiable or transferable order or authorization." Rather, RSUs permit withdrawal or transfer of savings funds upon non-transferable order when the customer uses his personal identification card to obtain access to his funds. This procedure is expressly authorized by the last clause of Section 5(b)(1) and was properly endorsed by the FHLBB under its broad rule-making authority (12 U.S.C. 1464(a), (b)).

The assertion of the court of appeals that use of a remote service unit is the "functional equivalent" of a checking transaction is groundless. RSUs and checking transactions are wholly distinct. A customer using a remote service unit withdraws funds

from his account at a federal savings and loan association. The customer gives no one a check or negotiable instrument. By contrast, a person using a check or negotiable instrument designates a payee, who may elect to cash the check himself. The payee may also direct the drawee bank to pay a third party, who may, in turn, direct payment to yet another person. In sum, a check is a fully transferable and negotiable instrument, whereas the machine readable cards used by customers to activate remote service units are not negotiable or transferable in any way. See Appendix E, *infra*, 49a.[5]

[5] The court of apeals apparently concluded that obtaining funds from a remote service unit was equivalent to obtaining funds by cashing a check (App. A, *infra*, 3a). However, the fact that remote service units may be used as an alternative to engaging in a checking transaction does not make their use the same as a checking transaction. Acceptance of that proposition would mean that passbook savings accounts must be classified as checking accounts merely because some people use them in lieu of checking accounts.

CONCLUSION

The petition for a writ of certiorari should be granted.[6]

Respectfully submitted.

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AUGUST 1979

[6] Two bills introduced in Congress would, if enacted, expressly sanction the banking practices at issue here. H.R. 4986 (formerly H.R. 3864), 96th Cong., 1st Sess. (1979); S. 1347, 96th Cong., 1st Sess. (1979). The pendency of these proposals does not, in our view, detract from the importance of this Court's review of the decision below. Whether and when the bills will be enacted is a matter of conjecture. If these proposals are enacted and the present case is mooted thereby, we will promptly notify the Court.

APPENDIX A

NOT TO BE PUBLISHED—SEE LOCAL RULE 8(f,

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

[Filed Apr. 20, 1979]

SEPTEMBER TERM, 1978

Civil Action No. 77-2102

No. 78-1337

AMERICAN BANKERS ASSOCIATION AND
TIOGA STATE BANK, APPELLANTS

v.

LAWRENCE B. CONNELL, JR., Administrator of the
National Credit Union Administration, ET AL.

Civil Action No. 76-0105

No. 78-1849

INDEPENDENT BANKERS ASSOCIATION OF AMERICA,
a corporation, APPELLANT

v.

FEDERAL HOME LOAN BANK BOARD, ET AL.

Civil Action No. 78-0878

No. 78-2206

UNITED STATES LEAGUE OF SAVINGS ASSOCIATIONS, an Illinois not-for-profit corporation, APPELLANT

v.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, an agency of the United States, ET AL.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BEFORE: McGOWAN, TAMM and WILKEY, Circuit Judges

JUDGMENT

These causes came on to be heard on their records on appeal from the United States District Court for the District of Columbia, and they were argued by counsel before this panel.

It appears to the court that the development of fund transfers as now utilized by each type of financial institution involved herein, commercial banks with "Automatic Fund Transfers," savings and loan associations with "Remote Service Units," and federal credit unions with "Share Drafts," in each instance represents the use of a device or technique

which was not and is not authorized by the relevant statutes, although permitted by regulations of the respective institutions' regulatory agencies. Specifically, the transfer from an interest-bearing time deposit (savings) account to a noninterest-bearing demand (checking) account by the Automatic Fund Transfer system, authorized by the Board of Governors of the Federal Reserve System in 43 Fed. Reg. 20,001 (1978) (to be codified in 12 C.F.R. § 217.5(c)(2) and (3)), is that "indirect[] . . . device" prohibited by 12 U.S.C. § 371a (1976);[1] the Remote Service Units utilized by many savings and loan associations, pursuant to Federal Home Loan Bank Board regulations (12 C.F.R. § 545.4-2 (1978)) which permit the withdrawal of funds from an interest-bearing time deposit account by a device functionally equivalent to a check, are in violation of the prohibition against checking accounts contained in Section 5(b)(1) of the Home Owners' Loan Act of

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[1] Similarly, the Automatic Fund Transfer system authorized by the Federal Deposit Insurance Corporation in 43 Fed. Reg. 20,222 (1978) (to be codified in 12 C.F.R. § 329.5(c)(2)) is in violation of 12 U.S.C. § 1828(g) (1976), which directs the Board of Directors of the FDIC to prohibit the payment of interest on demand deposits. The court is of the view that the Automatic Fund Transfer system allows, in effect, for interest to be paid on demand deposits.

The Automatic Fund Transfer system also, in its effect, violates 12 U.S.C. § 1832(a) (as amended by Pub. L. No. 95-630, § 1301, 92 Stat. 3712, 10 Nov. 1978), which provides that, except in seven New England states, withdrawals from savings accounts may not be made by negotiable or transferable instruments for the purpose of making transfers to third parties.

1933 (12 U.S.C. § 1464(b)(1) (1976)); and the Share Drafts utilized by some federal credit unions, pursuant to National Credit Union Administration regulation (12 C.F.R. § 701.34 (1978)), are the practical equivalent of checks drawn on these interest-bearing time deposits in violation of the provisions of the Federal Credit Union Act, 12 U.S.C. §§ 1751-90 (1976).[2]

The history of the development of these modern transfer techniques reveals each type of financial institution securing the permission of its appropriate regulatory agency to install these devices in order to gain a competitive advantage, or at least competitive equality, with financial institutions of a different type in its services offered the public. The net result has been that three separate and distinct types of financial institutions created by Congressional enactment to serve different public needs have now become, or are rapidly becoming, three separate but homogeneous types of financial institutions offering virtually identical services to the public, all without the benefit of Congressional consideration and statutory enactment.

This court is convinced that the methods of transfer authorized by the agency regulations have outpaced the methods and technology of fund transfer

[2] The Act does not contain an express grant of power to offer share drafts, nor can that power be implied in view of the legislative history of laws regulating financial institutions (*see* Brief for Appellant in No. 78-1337, at 9-26), which demonstrates an intent on the part of Congress not to authorize federal credit union share draft programs.

authorized by the existing statutes. We are neither empowered to rewrite the language of statutes which may be antiquated in dealing with the most recent technological advances, nor are we empowered to make a policy judgment as to whether the utilization of these new methods of fund transfer is in the overall public interest. Therefore, we have no option but to set aside the regulations authorizing such fund transfers as being in violation of statute. We do so with the firm expectation that the Congress will speedily review the overall situation and make such policy judgment as in its wisdom it deems necessary by authorizing in whole or in part the methods of fund transfer involved in this case or any other methods it sees fit to legitimize, or conversely, by declining to alter the language of existing statutes, thus sustaining the meaning and policy expressed in those statutes as now construed by this court.

We recognize that enormous investments have been made by various financial institutions in the installation of new technology, that methods of financial operation in the nation have rapidly grown to rely on much of this, and that a disruption of the offered services would necessarily have a deleterious impact on the financial community as a whole, in the absence of the certainty that new procedures are authorized for the foreseeable future, which certainty only a Congressional enactment can give.

We recognize that there are arguments that Congress has, at some times and in some measure, tacitly approved part of these regulatory authorizations, but

by no means directly, explicitly, or in the whole. We further recognize that the wisdom of the transfer procedures permitted by the regulations of the several agencies is a matter of high public financial policy, involving the financial interests not only of the parties before this court in these proceedings, but also of other large groups in the nation. It is the responsibility of the Congress and not the courts to determine such policy.

On consideration of the foregoing, it is

ORDERED AND ADJUDGED by this court that the judgments of the district courts under review herein are reversed and the cases are remanded to the respective district courts with instructions to vacate and set aside the applicable portions of the following regulations:

(1) 43 Fed. Reg. 20,001 (1978) (to be codified in 12 C.F.R. § 217.5(c)(2) and (3)) of the Board of Governors of the Federal Reserve System;

(2) 43 Fed. Reg. 20,222 (1978) (to be codified in 12 C.F.R. § 329.5(c)(2)) of the Board of Directors of the Federal Deposit Insurance Corporation;

(3) 12 C.F.R. § 545.4-2 (1978) of the Federal Home Loan Bank Board; and

(4) 12 C.F.R. § 701.34 (1978) of the National Credit Union Administration; and it is

FURTHER ORDERED, by the Court, that the effectiveness of this Judgment, insofar as it directs that the subject regulations be vacated and set aside,

is stayed until 1 January 1980 in the expectation that the Congress will declare its will upon these matters; and it is

FURTHER ORDERED, by the Court, that the Clerk is directed to enter copies of this Judgment in each of the captioned cases.

Per Curiam

For the Court:

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

[Filed May 21, 1979]

SEPTEMBER TERM, 1978

No. 78-1849

INDEPENDENT BANKERS ASSOCIATION OF AMERICA, a corporation, APPELLANT

v.

FEDERAL HOME LOAN BANK BOARD, ET AL.

BEFORE: McGOWAN, TAMM, and WILKEY; Circuit Judges

ORDER

Upon consideration of the petition for rehearing filed by appellees, it is

ORDERED, by the Court, that appellees' aforesaid petition for rehearing is denied.

Per Curiam

FOR THE COURT:

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 78-0878

UNITED STATES LEAGUE OF SAVINGS ASSOCIATIONS, PLAINTIFF

v.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, ET AL., DEFENDANTS

MEMORANDUM

This is a suit for declaratory and injunctive relief brought by the United States League of Savings Associations (USLSA), a national trade association representing approximately 4,400 state and federally chartered savings and loan associations (S & L's), to challenge regulations recently promulgated by the Board of Governors of the Federal Reserve System (the Board) and by the Federal Deposit Insurance Corporation (FDIC).

On May 1, 1978, the Board amended section 217.5 (c) of its Regulation Q,[1] which governs methods of withdrawal from savings deposits, to permit an indi-

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[1] 12 C.F.R. § 217.5(c).

vidual depositor at a federally insured bank to arrange, pursuant to a prior written agreement, for the automatic withdrawal of funds from his savings account and the transfer of such funds to demand deposit or other accounts.[2] This automatic fund transfer (AFT) service may be used to cover overdrafts or to maintain a specified balance in a depositor's checking account. On May 5, 1978, the FDIC, which regulates all federally insured commer-

[2] The complete text of the amendment reads:

> Notwithstanding the provisions of subparagraph (1) of this paragraph, withdrawals may be permitted by a member bank to be made automatically or as a normal practice from a savings deposit that consists only of funds in which the entire beneficial interest is held by one or more individuals through payment to the bank itself or through transfer of credit to a demand deposit or other account pursuant to a written authorization from the depositor to make such payments or transfers in order to cover checks or drafts drawn upon the bank or to maintain a specified balance in or to make periodic transfers to such accounts. In accordance with § 217.1(e)(2), a member bank must reserve the right to require the depositor to give notice in writing of an intended withdrawal not less than 30 days before such withdrawal is made. Such notice shall be prominently disclosed and specifically brought to the depositor's attention at the time the automatic transfer service is authorized. A member bank may not require a depositor to authorize such automatic transfers to be made from savings deposits.

43 Fed. Reg. 20002 (May 10, 1978). The Board has expressed its intent to monitor the effects of the automatic transfer service, especially its effect on the competitive structure among banks and thrift institutions. Not later than one year after the effective date, the Board will review its findings and report to the public. *Id.*

cial banks that are not members of the Federal Reserve System, adopted similar rules by amending section 329.5(c) of its Rules and Regulations.[3] The amended regulations are scheduled to take effect on November 1, 1978.

Plaintiff USLSA has challenged these regulations on the ground that they violate the statutory prohibitions against the payment of interest on demand deposits[4] and against withdrawal by negotiable in-

[3] 12 C.F.R. § 329.5(c). The amendment states:

> An insured nonmember bank may permit withdrawals to be made automatically from a savings deposit that consists of funds deposited to the credit of, and in which the entire beneficial interest is held by one or more individuals, through transfer or credit to a demand or other deposit account of the same depositor pursuant to a written agreement between the bank and the depositor authorizing such payments or transfers in connection with checks or drafts drawn by the depositor upon the bank, or for any other purpose not prohibited by law or regulation. Interest earned on a savings deposit may be transferred pursuant to the provisions of this subparagraph whether or not the depositor is an individual. In accordance with Section 329.1(e)(1)(iii) of this Part 329, the bank must reserve the right to require the depositor to give notice in writing of an intended withdrawal (transfer) not less than 30 days before such withdrawal (transfer) is made. This reservation shall be expressly set forth in the written agreement authorizing transfers pursuant to this subparagraph. The bank may not require the depositor to enter into an agreement providing for the automatic transfer of savings deposits as a condition to maintaining a savings or other deposit account.

43 Fed. Reg. 20223 (May 11, 1978).

[4] 12 U.S.C. § 371a (1976).

strument from interest-bearing savings deposits.[5] It notes that under the plan created by the amended regulations a check drawn on a demand deposit with insufficient funds would be covered automatically by a transfer from the drawer's savings deposit. The regulations do not require either a service charge for such transfers or a forfeiture of interest on the funds transferred.[6] Because funds needed to cover a check

[5] 12 U.S.C. § 1832(a) (1976). Under this section, federally insured banks and S & L's may not permit depositors to draw negotiable instruments against interest-bearing accounts except in the six New England states where such accounts, known as NOW (Negotiable Order of Withdrawal) accounts, are allowed by express statutory authorization. Pub. L. No. 94-222, 90 Stat. 197 (1976). Recent congressional action would permit such accounts in New York as well. H.R. 14279, Financial Institutions Regulatory and Interest Rate Control Act of 1978, title XIII, 95th Cong., 2d Sess. (1978), 124 Cong. Rec. H13040 (Oct. 14, 1978). These limited exceptions have been allowed in states in which state-chartered savings banks and savings and loan associations are permitted to offer checking accounts. By such legislation Congress seeks to protect the competitive position of federally regulated savings and loan associations, which would be placed at a disadvantage if they did not possess similar third-party payment powers. *See* R. Rep. No. 93-149, 93d Cong., 1st Sess. 2-5, *reprinted in* [1973] U.S. Code Cong. & Ad. News 2014, 2015-16.

[6] As originally proposed, the amendment required the forfeiture of interest in an amount no less than the interest actually earned during the previous 30 days on the funds transferred from savings to checking accounts. 43 Fed. Reg. 5008 (February 7, 1978). The final rule adopted by the Board does not require the imposition of an interest forfeiture, but the Board has encouraged member banks to develop charges for automatic transfers to reflect the costs of providing the service to depositors. 43 Fed. Reg. 20002 (May 10, 1978). Proposed AFT plans impose these costs in a variety of ways, either by requiring minimum balances in savings or checking accounts, by charging a flat monthly fee for the service, or by collecting a small fee for every transfer or for every day a transfer is made, regardless of the number. *See* Wash. Post, Oct. 29, 1978, § F, at 1.

can remain in an interest-bearing savings deposit until the check is presented for payment, plaintiff contends that the demand deposit account, which can be maintained with a zero balance, will be a mere conduit between the savings deposit and the payee named in the check. The USLSA characterizes AFT services as a "device" for allowing banks to pay interest on demand deposits and for permitting withdrawals by negotiable instruments from interest-bearing deposits in violation of statutory prohibitions. Because of the threatened economic injury to savings and loan associations if the regulations take effect,[7] plaintiff has brought this suit for declaratory and injunctive relief.

[7] Plaintiff maintains that a significant erosion of deposits from S & L's would occur if the interest rate paid by commercial banks on automatic transfer savings accounts approached the interest rate paid by savings and loan associations on passbook savings accounts. Complaint for Injunctive and Declaratory Relief, ¶ 20. This shift in funds from one type of financial institution to another, such as the transfer of money from S & L's to banks, is known as disintermediation. The parties have stipulated that the staff of the Federal Reserve System advised the Board of Governors at an open agency meeting that with the initiation of automatic funds transfer accounts $10 billion of thrift savings balances would be vulnerable to conversion to bank savings deposits during the four year period under consideration. Plaintiff's Summary Judgment Motion, Exhibit A.

Defendants deny this characterization and maintain their regulations preserve the longstanding distinction between interest-bearing savings deposits and noninterest-bearing demand deposits because the AFT regulations require the bank to reserve the right to require a depositor to give at least thirty days' notice of withdrawal from AFT accounts. They also urge that there is no violation of the prohibition against third-party payment from savings deposits because separate savings and checking accounts must be maintained and negotiable instruments are drawn only against the checking account. This matter is presently before the Court on defendants' motion to dismiss or, in the alternative, for summary judgment and plaintiff's cross-motion for summary judgment.

FACTUAL BACKGROUND

The Federal Reserve Board, which was established by the Federal Reserve Act of 1913,[8] is the agency of the federal government authorized by Congress to supervise and regulate commercial banks that are members of the Federal Reserve System.[9] The Federal Deposit Insurance Corporation has similar statutory responsibility for supervising and regulating all banks insured by it that are not members of the Federal Reserve System.[10] As a result, the regulations of these two bodies govern the activities of virtually all commercial banks in the United States.

[8] Pub. L. No. 63-43, ch. 6, 38 Stat. 251 (1913).

[9] 12 U.S.C. §§ 221 *et seq.* (1976).

[10] 12 U.S.C. §§ 1811 *et seq.* (1976).

The Federal Reserve Act of 1913 specifically defined the terms "demand deposit" and "savings deposit" and prescribed separate reserve requirements for each.[11] Savings deposits were subject to the legal right of the bank, at its discretion, to require a depositor to give at least thirty days' notice before withdrawing funds from the account. In contrast, demand deposits were not subject to any such requirement. The Banking Act of 1935,[12] however, repealed the statutory definitions of "savings deposit" and "demand deposit" that had appeared in the 1913 Act and substituted provisions granting the Board and the FDIC authority to define such terms.[13] In addition, they were authorized to determine what shall be deemed a payment of interest, and to prescribe rules and regulations "necessary to effectuate the purposes of this section and to prevent evasions thereof."[14] Board regulations relating to deposits and the payment of interest by member banks are known collectively as Board "Regulation Q." Since 1936 Regulation Q and the corresponding FDIC regulations have continued to distinguish savings deposits and demand deposits on the basis of the bank's right to require "notice in writing . . . not less than 30

[11] Pub. L. No. 63-43, ch. 6, 38 Stat. 251 (1913).

[12] Pub. L. No. 74-305, 49 Stat. 684 (1935).

[13] 12 U.S.C. §§ 461, 1828(g) (1976).

[14] *Id.*

days before such withdrawal is made" from savings accounts.[15]

On March 15, 1976, the Board and the FDIC published for comment proposals authorizing AFT that were essentially the same as the regulations challenged here.[16] No further action was taken on these proposals and on February 7, 1978, the Board republished for comment its proposal to authorize member banks to offer AFT plans.[17] The Board received a record number of comments on the AFT proposal,[18] and after considering the responses, adopted the amendments permitting automatic fund transfers on May 1, 1978. The FDIC took similar action on May 5, 1978. In adopting the challenged regulations, the Board stated that AFT would benefit the public by providing an additional and convenient means of sav-

[15] *Compare* 12 C.F.R. §§ 217.1(e)(2), 329.1(e)(1)(iii) (1978) (defining time depsits) *with* 12 C.F.R. §§ 217.1(a), 329.1(a) (1978) (demand deposits include every deposit that is not time or savings deposit).

[16] 41 Fed. Reg. 12039 (March 23, 1976).

[17] 43 Fed. Reg. 5008. The FDIC did not publish a separate proposal for amending its regulations, but invited comments on the Federal Reserve Board proposal. *Id.* at 7705.

[18] Of the 1,380 comments received, 721, or 52.2%, favored the proposal. Broken down by categories, 517 comments were from individuals, with 82% in favor of the proposal; 382 were from commercial banks, with 66.5% in favor of the proposal; and 370 were from savings and loan associations, with 100% opposed to the proposal. 43 Fed. Reg. 20001 (May 10, 1978). The FDIC received 436 comments, of which approximately 50% were in favor of adoption. 43 Fed. Reg. 20222 (May 11, 1978).

ings withdrawal service and would also increase the efficiency of the Federal Reserve System's check clearing operations by reducing the number of return items processed by the system.[19]

The regulations emphasize that AFT services are available only to individuals and that such services are entirely voluntary, both on the part of the bank and of the customer. The amended regulations require that any bank offering the AFT service reserve the right to require thirty days' notice before withdrawal and to disclose prominently and specifically the legal right of the bank to demand such notice.[20] Because of this requirement, the Board concluded that the amendment did not alter the basic distinction between savings and demand deposits and thus did not violate the statutory prohibition against the payment of interest on demand deposits. In addressing the argument that the amendments violated the prohibition of 12 U.S.C. § 1832 against negotiable orders or third-party payments from savings accounts, the Board concluded that the new regulations provide a withdrawal service that is "identical in its essential elements to withdrawal services that banks already are authorized to offer to depositors such as

[19] 43 Fed. Reg. 20001 (May 10, 1978). The Board staff has estimated a cost savings of $4 to $6 million per year from a reduction in the number of checks returned due to insufficient funds. Memorandum to the Board from its Legal Division and Division of Federal Reserve Bank Operations (October 22, 1975), Federal Reserve Board Administrative Record, at 22.

[20] 43 Fed. Reg. 20002 (May 10, 1978).

withdrawals in person or via telephone." [21] Plaintiff contends, however, that bank plans utilizing AFT services are being merchandized and are generally perceived as interest-bearing checking accounts.[22]

[21] *Id.* In recent years there has been a liberalization of methods of withdrawing funds from savings deposits. In 1961 the Board and the FDIC codified a longstanding ruling that allowed depositors to prearrange with their banks to make automatic withdrawals from savings deposits for the purpose of paying installments of principal, interest, or other charges due on a real estate loan or mortgage. 26 Fed. Reg. 12031 (Dec. 15, 1961). In April, 1975 the Board adopted an interpretation of Regulation Q that permitted a depositor to withdraw funds from a savings account at an insured bank by telephone. 40 Fed. Reg. 16831 (Apr. 15, 1975). At the same time, the Federal Home Loan Bank Board (FHLBB), which regulates federally insured S & L's, authorized its members, which are prohibited from offering checking accounts, to offer bill payer services pursuant to which a depositor may arrange in advance for an S & L to pay bills from the depositor's savings account or to transfer funds to any account at a commercial bank without any further action by the depositor. 12 C.F.R. § 545.4-1 (1978). In response to this amendment, the Board in July, 1975 and the FDIC in August, 1975 authorized commercial banks to offer similar bill payer services, except that authority to transfer funds automatically to a depositor's checking account to cover overdrafts or to maintain a minimum balance was withheld. 12 C.F.R. § 217.5(c), 329.5(c) (1978).

[22] Many newspaper reports discussing the new AFT regulations have characterized their adoption as a move by the Board and the FDIC to let banks pay interest on checking accounts. *See* Appendix to Consolidated Points and Authorities in Opposition to Defendants' Alternative Motions to Dismiss or for Summary Judgment and in Support of Plaintiff's Cross-Motion for Summary Judgment at A5-1 to A5-38. A number of bank advertisements promoting AFT services have described them as "interest on your checking account" and "as close as we can legally come to paying interest on checking." *Id.* at A9-1 to A11-1.

MERITS

A. *Judicial Review.*

Defendants have moved to dismiss plaintiff's complaint on the ground that the subject matter of the challenged regulations is committed to agency discretion by law and therefore is not subject to judicial review. Section 10(a)(2) of the Administrative Procedure Act [23] exempts from judicial review any action by an agency that is committed to the discretion of the agency by law. This exemption, however, is a very narrow exception applicable only "in those rare instances where the statutes are drawn in such broad terms that in a given case there is no law to apply." *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 410 (1971).

Defendants argue that the Federal Reserve Act and the Federal Deposit Insurance Act demonstrate a clear legislative intent to leave regulation of the practices involved here to the federal agencies, because the only standards to be applied in reviewing defendants' actions are legal standards that are to be defined by the defendant agencies. In further support of this argument, they note that in 1935 Congress abolished the statutory definitions of savings and demand deposits and contemporaneously enacted legislation granting agencies the right to define these terms.[24] They suggest that this conduct indi-

[23] 5 U.S.C. § 701(a)(2) (1976).

[24] Pub. L. No. 74-305, ch. 614, 49 Stat. 684 (1935).

cates a congressional intent to vest exclusive discretion over the area with the expert agencies.

In response, plaintiff maintains that there is specific governing law to apply in this case, namely, 12 U.S.C. § 371, which states that no member bank shall, directly or indirectly, by any device whatsoever, pay any interest on any deposit which is payable on demand . . ." and 12 U.S.C. § 1828(g), the corresponding provision of the Federal Deposit Insurance Act. It suggests that these statutes delineate the scope of the agencies' discretion and the legal standards by which their conduct is to be judged.

The presumption favoring district court jurisdiction to review actions of federal agencies is not easily overcome and will not be cut off unless there is "persuasive reason to believe that such was the purpose of Congress." *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 140 (1967); *see Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 410 (1971). In one of the most recent Supreme Court discussions of this issue, the Court held that it is necessary to review the statutory authority involved in order to determine "whether nonreviewability can fairly be inferred from the statute." *Morris* v. *Gressette*, 432 U.S. 491, 501 (1977). In making this determination, the specific statute in question should be examined "within the context of the entire legislative scheme." *Id.* at 503.

The specific statute at issue in *Morris* was section 5 of the Voting Rights Act of 1965,[25] which estab-

[25] 42 U.S.C. § 1973c (1970 & Supp. V 1975).

lishes two alternative methods by which states subject to the Act can obtain federal preclearance review of a change in their voting laws. The Court concluded that because of the "unusual" and "severe" nature of the section 5 remedy and its legislative history, it was clear that Congress intended to provide states with an expeditious alternative to declaratory judgment actions by allowing submission to the Attorney General. Because judicial review of the Attorney General's action would necessarily and unavoidably extend the time period specified in the statute, the Court held that such review was precluded. *Id.* at 504-05.

Here neither the statutory language nor the legislative history of the Banking Act of 1935 indicates a similar congressional intent to preclude judicial review. Therefore, the strong presumption favoring judicial review should govern here.

B. *Standing.*

Defendants also seek dismissal of the present action on the ground that plaintiff lacks standing to sue. Because USLSA brings this suit in a representative capacity on behalf of its members, it must establish that its individual members would satisfy the requirements of standing if the members themselves had brought the action. *Simon* v. *Eastern Kentucky Welfare Rights Organizations*, 426 U.S. 26, 40 (1976). The current test of standing, enunciated by the Supreme Court in *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150,

153 (1970), requires the complaining party to show the challenged action will result in "injury in fact" and that the interests that the party seeks to protect are arguably within the "zone of interests" to be protected and regulated by the particular statute.

Here, plaintiff has alleged that it represents over 4,400 S & L's, which hold over 98% of the total assets held by all savings and loan associations in the United States,[26] and that the regulations promulgated by defendants are likely to produce disintermediation of savings and loan assets of at least $10 billion. For the purposes of ruling on a motion to dismiss for lack of standing, the trial court must accept as true all material allegations of the complaint. *Warth* v. *Seldin*, 422 U.S. 490, 501 (1975). It is well-established that threatened economic injury produced by unlawful competition raises a justiciable controversy and that a trade association has standing to challenge such action on behalf of its members.[27]

Although plaintiff USLSA satisfies the "injury in fact" requirement of standing, it still must satisfy the requirement is within the "zone of interests" sought to be protected by the applicable statute. A recent opinion of this circuit interpreting this requirement held that "the particular statutory section should be the focus of analysis when applying the

[26] Complaint for Declaratory and Injunctive Relief, ¶ 8.

[27] *See, e.g., Investment Co. Institute* v .*Camp*, 401 U.S. 617, 620-21 (1971); *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150, 157 (1970); *Independent Bankers Ass'n* v. *Smith*, 534 F.2d 921, 926 (D.C. Cir. 1976).

zone test" and that litigants cannot "borrow the arguable regulatory or protective intent embodied in one provision . . . and apply it to a provision where the intent is not evident, in order to satisfy the zone test." *Tax Analysts & Advocates* v. *Blumenthal*, 566 F.2d 130, 140-41 (D.C. Cir. 1977). An amicus curiae brief filed by the American Bankers Association in support of defendants' motion to dismiss argues that the *Tax Analysts* decision limits the USLSA to the specific statutory sections which it claims forbid the challenged regulations—12 U.S.C. §§ 371a, 1828(g) and 1832—as a source of congressional intent to safeguard the competitive position of savings and loan associations. Therefore amicus urges that plaintiff cannot borrow this intent from a wholly unrelated aspect of federal banking laws—the statutory differential in interest rates permitted on savings accounts offered by S & L's and by commercial banks.[28]

In the *Tax Analysts* decision, however, the Court of Appeals indicated that it is appropriate to examine both particular and general provisions of a statutory scheme when these provisions share an "identity of purpose." 566 F.2d at 140. The Court determined that this approach was not appropriate in the case before it, which involved the Internal Revenue Code, because the Code is an extraordinarily complex document that does not have a single unified purpose, but instead is intended to accomplish a wide variety of social and economic goals. *Id.* at 141. The Court

[28] 12 U.S.C. § 461 note (1976).

concluded that if litigants were allowed to transfer the congressional intent and purpose embodied in one section of the Code into other contexts regulated by different provisions of the Code, endless litigation would result. *Id.*

Unlike the multi-purpose Internal Revenue Code, the provisions of the federal banking laws all reflect the goal of achieving a controlled money supply and regulated competition between financial institutions. Because plaintiff's complaint for declaratory and injunctive relief also reflects these purposes, the Court finds that the interests represented by the USLSA are within the zone of protected interests.

C. *Summary Judgment.*

Defendants seek summary judgment on the ground that the challenged regulations are a reasonable exercise of the agencies' statutory authority to define deposits, prescribe methods of withdrawal, and regulate the payment of interest on deposits. Plaintiff has cross-motioned for summary judgment, claiming that defendants, by adopting the AFT regulations, acted in excess of and contrary to their statutory authority and that consequently their action was arbitrary and capricious.

Plaintiff's central argument is that the AFT regulations violate the statutory prohibition of 12 U.S.C. § 371a, which states: "No member bank shall, directly or indirectly, by any device whatsoever, pay any interest on any deposit which is payable on de-

mand . . . ." [29] It claims that AFT services constitute such a device for the indirect payment of interest and offers the following scenario of how this could be achieved. If a bank offered an AFT plan without service charges, interest forfeiture provisions, required minimum balances, or required minimum transfers, a depositor could maintain a zero balance in his checking account and simply by writing a check, trigger an automatic transfer of funds from his savings account in the exact amount necessary to cover the amount of the check. Using this plan, a depositor could maintain all transactional funds normally kept in a checking account in an interest-bearing savings account without in any way impairing his access to those funds for the purpose of making third-party payments by check.[30]

The above plan probably represents the farthest possible extension of AFT services. Although such plans appear to offer, and indeed, are promoted as offering, "interest on checking accounts," this Court concludes that they do not violate the statutory prohibition of 12 U.S.C. § 371a. Automatic transfer

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[29] This prohibition applies to banks regulated by the Federal Reserve Board. Congress has authorized the FDIC "by regulation [to] prohibit the payment of interest or dividends on demand deposits in insured nonmember banks . . . ." 12 U.S.C. § 1828(g) (1976). The FDIC has adopted a regulation prohibiting the payment of interest on demand deposits that tracks the language of 12 U.S.C. § 371a. 12 C.F.R. § 329.2(a) (1978).

[30] Some commercial banks in the Washington, D.C. area have already begun promoting "zero balance checking" plans utilizing AFT service. *See* Wash. Post, Oct. 29, 1978, § F, at 5.

services require the existence of both a savings deposit and a demand deposit. The two accounts are distinguished not solely by the payment of interest but more significantly by the limitation of the right of withdrawal from savings accounts.[31] Indeed, the amount of interest offered on time deposits is inversely related to the limitations on withdrawal imposed by such accounts.[32] This distinction is preserved by the AFT regulations, which require banks to reserve the right to demand thirty days' notice of withdrawal and to bring this requirement specifically to the attention of depositors.

Plaintiff contends that this requirement is "illusory" because it is unlikely to occur given the chaos to financial institutions that would result if the statutory notice period was invoked before withdrawals were permitted. But the imposition of a notice requirement in AFT situations would produce a situation no different than its use with respect to ordinary savings deposits, where the possible disruption of financial services is just as real. Although other courts interpreting unrelated provisions of the banking laws have emphasized that the form of a bank service must not be allowed to mask its substance,[33]

[31] *See* 12 C.F.R. §§ 217.1(e)(2); 329.1(e)(1)(iii) (1978).

[32] *See* 12 C.F.R. § 217.7 (1978).

[33] *See, e.g., First National Bank in Plant City* v. *Dickinson*, 396 U.S. 122, 137 (1969) (bank's armored car messenger service and off-premises receptacle for receiving packages containing money constituted "branch" in violation of branch-

this Court finds that the AFT regulations do not constitute a device for the payment of interest on demand deposits.

The second major concern voiced by the USLSA is that the automatic funds transfer regulations violate the statutory prohibition against withdrawals by negotiable instrument for third-party payment from savings accounts. 12 U.S.C. § 1832(a). Under the AFT regulations a bank customer's check drawn on a zero balance account to a third party triggers a withdrawal from the savings account to cover the check. Although the existence of a checking account which serves as a conduit for payment to the third party factually distinguishes an AFT account from statutorily-authorized NOW accounts, plaintiff maintains that the checking account does not prevent the AFT-linked accounts from functioning as a NOW account.

Although plaintiff attempts to minimize the significance of the checking account linked to AFT service, its importance cannot be ignored. Two accounts are required to operate the AFT service and no negotiable orders are drawn on or third party payment made from the savings deposit. Defendants have suggested that AFT is merely an extension of the telephone transfer bill payer services. Telephone trans-

banking laws); *Independent Bankers Ass'n* v. *Smith*, 534 F.2d 921, 938-39 (D.C. Cir.) (off-premises "customer-bank communication terminals" were branches; lack of similarity to typical branch was difference in form, not difference in substance or result), *cert. denied*, 429 U.S. 862 (1976).

fer permits a bank to transfer a depositor's funds from a savings to a demand deposit account pursuant to transfer instructions conveyed by telephone.[34] Under AFT plans, such transfers would be automatically triggered on the basis of a prior authorization rather than requiring an individual telephone conversation for each transaction. AFT services also resemble bill payer services, for in both the depositor's bank withdraws funds from the depositor's account on the basis of a single prearrangement with the depositor, on an automatic basis, and without any further participation or action by the depositor.[35] The only difference is that bill payer services send the withdrawn funds by check or direct deposit to the depositor's creditors while funds withdrawn by AFT are added directly to the depositor's demand deposit account.

After oral argument of the parties' cross-motions for summary judgment was held in this case, both houses of Congress enacted a bill entitled "The Financial Institutions Regulatory and Interest Rate Control Act of 1978." [36] Defendants urge that the

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[34] 12 C.F.R. § 217.152 (1978).

[35] 12 C.F.R. §§ 217.5(c)(1)(vii), 329.5(c)(1)(vi) (1978).

[36] H.R. 14297, 95th Cong., 2d Sess. (1978), 124 Cong. Rec. H13040 (Oct. 14, 1978). As of the date of this memorandum, the enrolled bill has not yet been signed or vetoed by President Carter. By its Order of October 19, 1978, the Court directed the parties to this action to submit supplemental memoranda addressing the impact, if any, of this bill on the present litigation should it become law.

The bill contains three provisions that make reference to AFT services. Section 104 of Title 1 of the bill provides that

passage of this bill indicates congressional awareness of the AFT regulations and that body's intent to defer to defendant agencies' expertise in the affected subject areas. The Court cannot agree with this characterization. In its report discussing the interest rate differential provision, the Senate Committee on Banking, Housing, and Urban Affairs declared that the proposed bill "is not intended to authorize automatic transfer accounts nor to preclude a finding by a court of competent jurisdiction that such accounts are either permissible or impermissible under existing law." [37] During the House debate on the measure, explicit recognition was given to the present litigation challenging the legality of the AFT regulations and no opinion was expressed on the question.[38] The

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preauthorized transfers pursuant to an AFT agreement shall not constitute the payment of an overdraft that would violate the bill's prohibition against a member bank's payment of overdrafts of its executive officers or directors. Section 903(b)(D) of Title XX of the bill excludes AFT transfers between accounts from the provisions of the Electronic Funds Transfer Act, which establishes a regulatory framework for EFT systems. Title XVI of the bill eliminates the interest rate differential on savings deposits enjoyed by mutual savings banks, which are also permitted to offer checking services, if the two accounts are linked by AFT. Without this legislation, nothing would prohibit mutual savings banks offering checking accounts from entering into an AFT agreement with customers that would permit automatic transfers from a 5¼% savings account to a checking account even though all other institutions offering similar services, including NOW accounts, would be limited to a 5% interest ceiling.

[37] S. Rep. No. 95-1273, 95th Cong., 2d Sess. 3 (1978).

[38] 124 Cong. Rec. H13075 (daily ed. Oct. 14, 1978) (remarks of Rep. Rousselot).

passage of "The Financial Institutions Regulatory and Interest Rate Control Act of 1978" thus cannot be viewed as in any way dispositive of the legal questions raised by AFT services.

The final issue raised by plaintiff is that defendants acted arbitrarily and capriciously in adopting the AFT regulations. The specific claim is that it cannot be determined from the record whether defendants gave proper consideration to the competitive impact of AFT plans and to the impact of such plans on deposit reserve policies.[39] The arbitrary and capricious standard is the most limited form of judicial review over agency actions and the scope of such review is narrow and highly deferential to the agency. *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 415 (1971). Here the administrative record of the Board proceedings alone comprised over 400 pages in addition to the almost 1,400 written comments received on AFT services.[40] Given such a fully developed record and the widespread attention the AFT proposals have received at every stage of their consideration, there appears to be no support for plaintiff's argument that the decision on AFT services was arbitrary and capricious except for the agencies' lack of agreement with plaintiff's position.

[39] As one means of controlling the money supply, Congress has mandated that member banks of the Federal Reserve System maintain certain minimum reserves with respect to demand and savings deposits. 12 U.S.C. § 461(b) (1976). The Board has always required significantly larger reserves for demand deposits than for savings deposits. For example, on December 31, 1977, the Board's regulations required a 7% to 16¼% range of reserves for demand deposits but reserves of only 3% for savings deposits. 64 Fed. Res. Bull. A9, Table 1.15 ("Member Bank Reserve Requirements") (Jan. 1978). Plaintiff contends that initiation of AFT services will result in a shift of funds from checking accounts to linked savings accounts that will free up reserves in an amount equal to the difference between the reserve requirements for the respective accounts.

In conclusion the Court finds that automatic fund transfer regulations do not violate the statutory prohibitions against the payment of interest on demand deposits or against negotiable instruments drawn on savings deposits. This result is supported by the convenience and other benefits AFT services will produce for bank customers and by the role such services will play in reducing the number of checks returned for insufficient funds. Therefore, defendants' motion for summary judgment is granted and all other motions are denied.

/s/ Oliver Gasch
Judge

Date: Oct. 30, 1978

[40] *See* note 18 *supra*.

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Filed Mar. 7, 1978]

Civil Action 77-2102

AMERICAN BANKERS ASSOCIATION, ET AL.,
PLAINTIFFS

v.

LAWRENCE B. CONNELL, JR., ET AL., DEFENDANTS

MEMORANDUM

This an action by the American Bankers Association and Tioga State Bank against the National Credit Union Administration ("NCUA") and its Administrator, challenging the statutory authority of Federal Credit Unions ("FCUs") to operate share draft programs under the Federal Credit Union Act (the "FCU Act"), 12 U.S.C. § 1751, *et seq.*[1] The

[1] On February 17, 1978, this Court denied motions to intervene filed by the Independent Bankers Association of America (seeking intervention as party-plaintiff), Credit Union National Association, National Association of Federal Credit Unions, and the Consumer Federation of America (seeking intervention as parties-defendant). However, the Court granted these organizations leave to participate as amici curiae. The terms "plaintiff" and "defendant" used herein shall include reference to the positions of the amici.

matter is before the Court on the parties' cross-motions for summary judgment. For the reasons discussed below, the Court finds that there are no genuine issues of material fact and that Defendants are entitled to judgment as a matter of law.

A share draft is a demand draft which is drawn by a member on his credit union share account and which is made payable to third parties. Each share draft is payable through a particular commercial bank. The function of the payable-through bank is to receive share drafts through bank clearing channels and present them to the credit union for payment. Share drafts are similar in appearance to checks and other drafts in that they provide spaces for a date, the name of the payee, the amount of the draft, and the member's signature as drawer. The member fills in the share draft, signs it, and delivers it to the payee in return for goods or services or for cash. Because the accounts on which share drafts are drawn are share accounts, such accounts earn dividends in the same fashion as regular credit union shares. However, no dividends are paid on those funds that are withdrawn from the account by share draft or otherwise before the end of the dividend period. Share draft accounts are subject to the right of FCUs to require sixty (60) days advance notice of withdrawal.

FCU share drafts originated in 1974 as an experimental pilot program approved by NCUA. By late 1977 some 514 FCUs in at least forty-five (45) states were participating in share draft programs. In Sep-

tember 1976, the American Bankers Association filed an action challenging the legality of the experimental share draft program. That litigation was dismissed without prejudice after NCUA agreed to undergo rule-making procedures and promulgate a formal rule governing share drafts. On December 8, 1977, NCUA published its final rule, which authorizes FCUs to continue establishing and implementing share draft programs.[2] Plaintiffs filed the instant lawsuit on December 9, 1977.

The issue before the Court is whether, consistent with the terms of the FCU Act and the general statutory scheme controlling federal financial institutions, the NCUA can authorize FCUs to utilize share drafts as a means of accessing members' accounts. A secondary issue in the case is whether the manner in which NCUA promulgated its regulation comports with the standards of the Administrative Procedure Act.

The Court begins with the proposition that a departmental construction of its own enabling legislation is entitled to great deference from the Courts. *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965). The interpretation given the statute by the agency charged with its administration is sustainable as long as that interpretation has a reasonable basis in law. Only where there are compelling indications that the interpretation is plainly erroneous should a Court invalidate an administrative construction of a statute. *Espinoza* v. *Farah Manufacturing Company*, 414 U.S. 86, 94-95 (1974); *Zuber* v. *Allen*, 396 U.S. 168, 192-193 (1969); *Board of Dir. & Officers, Forbes Federal Credit Union* v. *National Credit Union Administration*, 477 F.2d 77, 784 (10th Cir. 1973).

[2] See 12 C.F.R. § 701.34 at 42 Fed. Reg. 61977 (1977). The effective date of the rule was February 6, 1978, but implementation of the rule has been deferred pending resolution of the motions for summary judgment.

It is uncontested that FCUs possess the power to authorize and regulate withdrawals from share accounts. The source for this power is no where found in the express provisions of the FCU Act.[3] Rather, such power must be inferred from the language of 12 U.S.C. § 1757(15), which grants FCUs the authority to "exercise such incidental powers as shall be necessary or requisite to enable [FCUs] to carry on effectively the business for which [FCUs are] incorporated." An activity is authorized as an "incidental power" if it is convenient or useful in connection with the performance of one of the institution's established activities pursuant to its express powers. *Arnold Tours* v. *Camp*, 472 F.2d 427, 432 (1st Cir. 1972).

Defendants contend that the authority for FCUs to use share drafts procedures likewise can be inferred from the "incidental powers" clause of the

[3] While 12 U.S.C. § 1757(6) gives FCUs the express authority to receive the funds of their members for deposit into withdrawable share accounts, and makes those shares subject to the terms, rates and conditions established by the board of directors and the Administrator, the Act is completely silent as to how withdrawals may be requested or paid.

FCU Act.[4] Plaintiffs argue that share draft powers fail to qualify as incidental powers under the *Arnold Tours* standard. Plaintiffs liken share drafts to checks and demand deposits and claim that absent express statutory authorization FCUs lack the authority to permit members to access their accounts by means of share drafts.

Both sides focus too strongly on the mechanics of accessing accounts. What is important is not the method by which withdrawals are effected, but rather the type of account involved in this litigation: the traditional FCU share account.[5] There is no legal restriction on the amount or frequency of withdrawals from credit union share accounts. In the past, FCU members have had a variety of options available for withdrawing funds and making payments to third-parties out of their share accounts, including

[4] Defendants also argue that share drafts are expressly authorized under the FCU Act as part of the exercise of FCUs' powers to contract, 12 U.S.C. § 1757(1), or powers to receive and condition payments on shares, 12 U.S.C. § 1757 (6). However, the Court is not persuaded that either express provision, by itself, extends to the accessing of members' share accounts by means of share drafts.

[5] While share drafts differ from checks in certain respects, most notably in the 60 day notice provision which applies to share drafts, the distinction between share drafts and checks or demand deposits seems irrelevant to the Court. Share drafts may actually be equivalent to checks. In whatever manner share drafts are classified, however, the function of share drafts remains constant: share drafts are simply a method of accessing credit union share accounts. The validity or invalidity of share drafts must be measured, therefore, in terms of the relationship between share drafts and share accounts.

cash withdrawals, and withdrawals by travelers checks, by money order, or by credit union check. Further, it is not necessary that members make their withdrawals in person. Share drafts have been developed as a more convenient and efficient means by which FCUs can offer withdrawal and payment services, allowing FCUs to take advantage of advancements in computer technology.[6] Share drafts are simply a variation on established methods of accessing members accounts, similar to previous procedures for credit union third-party payments, and similarly valid as part of the exercise of FCUs incidental powers under the FCU Act.[7] To rule otherwise would be to raise form over substance, to deny the history of the use of drafts in commercial practice, and to unreasonably limit the undisputed power of FCUs to honor and regulate share account withdrawals.

Such a holding does not work violence with the statutory purposes for which FCUs were created. FCUs exist for the purposes of promoting thrift among members and creating a source of credit for provident or productive enterprises. 12 U.S.C. § 1752 (1). There has been no suggestion that the share draft program, as presently conducted on an experimental basis, has adversely affected the viability of

[6] The major advancement in the field has been the development of electronic funds transfer devices.

[7] See in the context of state-chartered credit unions, the Court's discussion in Iowa Credit Union League v. Iowa Department of Banking, Civil No. CE 6-3152 (D. Iowa May 24, 1977), appeal docketed, No. 2-60827, Supreme Court of Iowa, July 8, 1977.

FCUs or the interests of FCU members. The Court is satisfied that the use of share drafts will serve the basic purposes of FCUs.[8]

Further, the Court is persuaded that a finding that share draft practices are among the incidental powers of FCUs is not inconsistent with the legislative history of the FCU Act or the general Congressional scheme controlling federal financial institutions. Legislative history in this case has minimal utility. On the one hand, there is no indication from the Congressional debates on the FCU Act and other related legislation that Congress has intended to prohibit FCUs from utilizing share draft procedures. Throughout the course of development by FCUs of various methods of withdrawal from members' share accounts, there has been total silence from Congress concerning the propriety of any of these methods. Congress has been well aware of the on-going share draft program for several years now,[9] and yet in passing sweeping amendments to the FCU Act in 1977 failed to include any provision evidencing disagreement with the NCUA's position regarding share drafts. When Congress has intended to proscribe conduct on the part of financial institutions, Con-

[8] See the conclusions of the Administrator of NCUA, expressed at 42 Fed. Reg. 69178 (December 8, 1977).

[9] Between 1974 and 1976, share drafts were called to the attention of the Congress during testimony before the House and Senate oversight committees on federal financial institutions on numerous occasions. See the subcommittee hearings cited in Defendants' brief in support of Defendants' motion for summary judgment, pp. 24-25.

gress has done so with dispatch and specificity. See 12 U.S.C. §§ 1464(b) and 1832.[10] Thus it might be possible to find an implied ratification by Congress of NCUA's approval of FCU share drafts. See *Massachusetts Mutual Life Ins. Co.* v. *United States*, 288 U.S. 269, 283 (1933); *Alabama Association of Insurance Agents* v. *Board of Governors of the Federal Reserve System*, 533 F.2d 224 (5th Cir. 1976).

On the other hand, measures which would have authorized certain third-party payment powers on the part of FCUs have been introduced in the Congress, but have failed to pass.[11] In addition, there is language in the Congressional discussions on the FCU Act and related legislation that Congress has intentionally deferred consideration of the issue of FCU third-party payment powers.[12] This deferred consid-

[10] With respect to the NOW account legislation, 12 U.S.C. § 1832, it is interesting to note that FCUs were expressly excluded from the definition of "depository institutions" covered by the statute.

[11] See H.R. 8199 (1965) and 29 (1969), which would have given FCUs the authority to offer checking accounts for their members. See also H.R. 13077 (1976), which would have authorized FCUs to offer third-party payment accounts in states where state-chartered credit unions had that power. In addition, a provision in the proposed Credit Union Modernization Act of 1977 (123 Cong. Rec., p. H-166) would have amended 12 U.S.C. § 1757 to give FCUs the power to "sell, purchase or handle any money transfer instrument to or for members," but did not pass.

[12] See the remarks of Rep. J. William Stanton, Cong. Record, March 1, 1977, p. H-1525. See also the remarks of Senator Thomas McIntyre in the context of the NOW account legis-

eration is evident in the fact that there is presently pending before the Congress several pieces of proposed legislation which relate to FCU share draft powers.[13]

Congressional failure to specifically address the share draft issue and the spectre of future legislation on the subject do not mean that FCUs presently lack the authority to adopt share draft procedures. As noted earlier, share draft practices are valid as part of the exercise of the incidental powers of FCUs. If Congress eventually acts with regard to share drafts, Congress then will be making a policy judgment.[14] This Court cannot and will not indulge in such policy judgments. If accessing FCU members' accounts by means of share drafts is to be proscribed, it must be proscribed by the legislature.

The NCUA promulgated its final rule concerning share drafts, 12 C.F.R. § 701.34, after extensive rulemaking which included the solicitation of written and

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lation, Hearings, Senate Banking Committee, Subcommittee on Financial Institutions, 93d Cong., 1st Sess., March 30, 1973, p.3.

[13] See, for e.g., S. 2055, introduced on June 9, 1977, which would authorize the use of NOW Accounts by banks, savings and loans, and credit unions, and bring FCU share draft regulations into accord with regulations to be promulgated as to NOW Accounts.

[14] Both sides make much about the competitive position of FCUs vis-a-vis commercial banks. However, there is at present no policy concern with respect to competitive balance reflected in the FCU Act. This is what distinguishes the case at hand from Independent Bankers Association of America v. Smith 534 F.2d 921 (D.C. Cir. 1976).

oral views of numerous persons, organizations and banks, and which involved hearings in which plaintiffs and the various amici participated. The Court is not persuaded that the manner in which the rule was formulated is in any way violative of the provisions of the Administrative Procedure Act. In creating the NCUA, Congress directed the agency to be more responsive to the needs of credit unions and to provide more flexible and innovative regulation.[15] NCUA's actions with respect to share drafts are consistent with its mandate. The Court finds that NCUA's determination that share draft practices are in accord with the statutory purposes of FCUs and within the authority of FCUs under the provisions of the FCU Act has a rational basis and is not arbitrary or capricious or otherwise plainly erroneous.

For the above-stated reasons, the Court concludes that defendants are entitled to summary judgment herein.

/s/ Aubrey E. Robinson, Jr.
AUBREY E. ROBINSON, JR.
United States District Judge

March 7, 1978
(Date)

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[15] See S. Rep. No. 518, 91st Cong., 2d Sess., 3 (1970).

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Filed Jun. 30, 1978]

Civil Action 76-0105

INDEPENDENT BANKERS ASSOCIATION OF AMERICA,
PLAINTIFF

v.

FEDERAL HOME LOAN BANK BOARD, ET AL.,
DEFENDANTS

MEMORANDUM

This is an action in which the Independent Bankers Association of America ("IBAA"), a commercial bank trade association, challenges the authority of the Federal Home Loan Bank Board (the "Board") to promulgate pursuant to the Home Owners' Loan Act of 1933, as amended, 12 U.S.C. § 1461, et seq. (the "HOLA") an electronic funds transfer system ("EFTS") regulation which permits federal savings and loan associations ("FSLs") to utilize remote service units ("RSUs") as a means of accessing members' accounts. The matter is before the Court on the Parties' cross-motions for summary judgment.

For the reasons discussed below, the Court finds that there are no genuine issues of material fact and that Defendants are entitled to judgment as a matter of law.[1]

RSUs are computer terminals which allow FSL members to access their FSL accounts without having to appear at an FSL office. RSUs may be located off the premises of an FSL's authorized office in places like shopping centers, office buildings, transportation depots and retail sales establishments. RSUs may be completely automated or may require the participation of the personnel at the establishment where the unit is located. Access through an RSU to a member's account is dependent upon the use of a machine-readable instrument in the possession and control of the account holder.

On January 9, 1974, the Board adopted § 545.4-2 of its Rules and Regulations, 12 C.F.R. § 545.4-2, authorizing FSLs to operate electronic funds transfer systems on an experimental basis upon Board ap-

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[1] The Court finds that Plaintiff has the requisite standing to challenge the statutory authority of the Board to permit FSLs to operate RSU programs and therefore proceeds to a consideration of the merits with regard to the first, second, third, tenth and eleventh counts of Plaintiff's Complaint. See Wisconsin Bankers Association v. Robertson, 190 F.Supp. 90, 94 (D.D.C. 1960), aff'd 294 F.2d 714 (D.C. Cir. 1961); Independent Bankers Association of America v. Smith, 402 F. Supp. 207, 208 (D.D.C. 1975), aff'd 534 F.2d 921 (D.C. Cir. 1976), cert. den. 429 U.S. 862 (1976). In addition to its general challenge to adoption of the RSU regulation, Plaintiff has raised a number of secondary issues in this lawsuit relating to specific provisions of the RSU regulation and with regard to these issues the Court finds that Plaintiff lacks standing. See footnote four, infra.

proval. This experimental regulation has been extended periodically by the Board and has remained in uninterrupted existence for over four (4) years.[2] The present RSU regulation extension expires on June 30, 1978.[3] After unsuccessfully attempting to persuade the Board to terminate the RSU program, Plaintiff filed the instant lawsuit on January 19, 1976.

The issue before the Court is whether consistent with its statutory authority under the HOLA the Board has validly authorized FSLs to establish and operate RSUs.[4] Analysis of this issue involves two

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[2] On June 26, 1974, the Board amended the original experimental regulation, simplifying its terms. See Board Resolution No. 74-573. This amendment was effected after the Board underwent rulemaking procedures, see 39 Fed. Reg. 16484, in which a number of public comments were received, including comments from Plaintiff herein.

[3] On May 24, 1978, the Board adopted a final remote service unit regulation. See Board Resolution No. 78-311, 43 Fed. Reg. 22,929 (May 30, 1978). The permanent RSU regulation closely tracks with previous requirements and becomes effective July 1, 1978.

[4] In addition to IBAA's claims that the Board has exceeded its authority under 12 U.S.C. § 1464 in adopting the RSU regulation, IBAA makes a number of other arguments against the regulation: that the regulation permits FSLs to establish branch offices without complying with Board requirements for the establishment of such offices; that the Board's determination that RSUs do not constitute branch offices is arbitrary and capricious; that merchant participation in RSU projects amounts to the unlawful conduct of the business of FSUs by third parties contrary to 12 C.F.R. §§ 545.15 and 556.6; that merchant participation constitutes an unsafe and unsound policy and practice contrary to 12 U.S.C. § 1726 and 12 U.S.C. §563.17; that merchant participation involves the making of

considerations: whether the Board has exceeded its authority under Section 5(a) of the HOLA, 12 U.S.C. § 1464(a)[5] and whether utilization of RSUs violates the prohibition contained in Section 5(b)(1) of the HOLA, 12 U.S.C. § 1464(b)(1)[6] against accounts

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unsecured loans to merchants in violation of 12 U.S.C. § 1464 (c) and 12 C.F.R. § 545.6; and that the regulation fails to provide adequate measures to protect the privacy of information and the security of funds involved in RSU transactions, contrary to the requirements of the Bank Protection Act, 12 U.S.C. § 118, et seq. With respect to these arguments, the Court finds that Plaintiff lacks standing to contest such matters. Questions relating to the propriety of excluding RSUs from the Board's branching regulations, to merchant participation in RSU projects, and to the privacy of information and the security of funds involved in RSU transactions are matters directed to the exclusive discretion of the Board, to be decided in accord with the best interests of FSLs. Commercial banks are not within the zone of interests protected by the HOLA in connection with such decisions. See Union National Bank of Clarksburg v. Federal Home Loan Bank Board, 233 F.2d 695, 696-7 (D.C. Cir. 1956). Therefore, IBAA's claims with regard to these matters must be dismissed.

[5] 12 U.S.C. § 1464(a) provides:

> In order to provide local mutual thrift institutions in which people may invest their funds and in order to provide financing of homes, the Board is authorized, under such rules and regulations as it may prescribe, to provide for the organization, incorporation, examination, operation and regulation of associations to be known as "Federal Savings and Loan Associations," and to issue charters therefor, giving primary consideration to the best practices of local mutual thrift and home-financing institutions in the United States.

[6] 12 U.S.C. § 1464(b)(1) provides, in pertinent part:

> An association may raise capital in the form of such savings deposits, shares or other accounts . . . as are

subject to check withdrawal. The Court approaches these questions mindful that an agency construction of its own enabling legislation is entitled to great deference. *Kupiec* v. *Republic Federal Savings and Loan Association*, 512 F.2d 147, 151 (7th Cir. 1975); *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965). The interpretation given the statute by the agency charged with its administration and that agency's exercise of its expert judgment are sustainable as long as that judgment has a reasonable basis in law. See *Guaranty Savings and Loan Association* v. *Federal Home Loan Bank Board*, 330 F. Supp. 470, 473 (D.D.C. 1971). Only where there are compelling indications that the interpretation is plainly erroneous should a Court invalidate an administrative construction of a statute. *Espinoza* v. *Farah Manufacturing Company*, 414 U.S. 86, 94-5 (1974); *Zuber* v. *Allen*, 396 U.S. 168, 192-3 (1969); *Central Bank* v. *Federal Home Loan Bank of San Francisco*, 430 F.Supp. 1080, 1085 (N.D. Cal. 1977).

Section 5(a) of the HOLA constitutes a broad grant of statutory authority. See *Wisconsin Bankers Association* v. *Robertson, supra.* It is well-established

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authorized by its charter or by regulations of the Board . . . [T]he payment of any savings account shall be subject to the right of the association to require . . . advance notice . . . . Savings accounts shall not be subject to check or to withdrawal or transfer on negotiable or transferable order or authorization to the association, but the Board may by regulation provide for withdrawal or transfer of savings accounts upon non-transferable order or authorization.

that the HOLA confers wide discretion upon the Board in regulating the operation of FSLs. *Bloomfield Federal Savings and Loan Association* v. *American Community Stores Corp.*, 396 F.Supp. 384, 386 (D. Neb. 1975); *Federal Home Loan Bank Board* v. *Rowe*, 284 F.2d 274, 278 (D.C. Cir. 1960); *Bridgeport Federal Savings and Loan Association* v. *Federal Home Loan Bank Board*, 307 F.2d 580, 584 (3d Cir. 1962), cert. den. 371 U.S. 950 (1963); *Central Savings and Loan Association of Chariton* v. *Federal Home Loan Bank Board*, 422 F.2d 504, 506-7 (8th Cir. 1970). Intrinsic to the authority and function of the Board is the power to initiate, adopt and institute the best practices of savings institutions. *Bloomfield, supra*, at 388. The Board is not limited to existing FSL practices, but may adopt new methods to better service FSL members. *Chariton, supra*, at 506-7.[7]

The Court is persuaded that RSUs are merely an improvement upon traditional methods whereby members may access their FSL accounts. The Court is satisfied that RSU activity is in no way inconsistent with past practices of FSLs or with the purposes for which FSLs were created. FSLs exist to promote

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[7] The propriety of Board authorization of new methods of FSL operation is underscored by the 1968 amendment to Section 5(b)(1) of the HOLA, designed to give the Board greater flexibility in developing new account instruments and in attracting new FSL members. See H.R. Rep. No. 1042, 90th Cong., 1st Sess., 3 and 7 (1967); 114 Cong. Rec. 20540 (1968) (remarks of Representative Hanna); H.R. Rep. No. 1585, 90th Cong., 2d Sess., 107-8 (1968).

thrift and provide a source for home financing. 12 U.S.C. § 1464(a).[8] There has been no suggestion that RSU use to date has adversely affected the viability of FSLs or the interests of FSL members. Rather, the record indicates the opposite to be true.[9] The Court finds that RSU activity serves the basic purposes of FSLs, that the decision to implement such activity is within the special expertise of the Board, and that in allowing the utilization of RSUs the Board has not exceeded the scope of its authority under Section 5(a) of the HOLA. See *Bloomfield, supra.*

Section 5(b)(1) of the HOLA expressly prohibits FSL accounts from being subject to "check or to withdrawal or transfer on negotiable or transferable order or authorization." Plaintiff argues that RSU activity violates this proscription. However, a close reading of the Uniform Commercial Code belies Plaintiff's claim. The U.C.C. defines a check as a negotiable instrument drawn on a bank and payable on demand. U.C.C. § 3-104(2) (1972 ed.) Negotiable instruments are defined, in pertinent part, as writings signed by the maker or drawer containing an order to pay a sum certain which is payable on demand or at a definite time to the bearer. U.C.C. § 3-104 (1972 ed.). The RSU transaction and the machine readable in-

[8] See also S. Rep. No. 91, 73d Cong., 1st Sess., 2 (1933); H.R. Rep. No. 55, 73d Cong., 1st Sess., 2 (1933).

[9] See, for e.g., Stipulation No. 69 of the Second Set of Stipulations herein. See also the Final Report of the National Commission on Electronic Funds Transfers, p. 139 (October 28, 1977).

strument used to effect that transaction do not fit within the ambit of the U.C.C. definitions. FSL accounts are accessed through RSUs by use of an "RSU activator." This activator must be in the possession and control of the member. Activators are non-transferable. No negotiable or transferable instrument is used in connection with the operation of RSUs and therefore RSU transactions do not constitute "checking transactions" within the meaning of the language of 12 U.S.C. § 1464(b)(1).

Nonetheless, Plaintiff insists that RSU activity is the functional equivalent of checking activity and should be invalidated on that basis. Plaintiff derives its equivalence argument from a reading of the line of "branch banking" cases involving national bank use of customer-bank communications terminals ("CBCTs"). Chief among these cases are *Independence Bankers Association of America* v. *Smith, supra,* and *Illinois ex rel Lignoul* v. *Continental Ill. Nat'l Bank and Trust Co.*, 536 F.2d 176 (7th Cir. 1976), cert. den. 429 U.S. 871 (1976). The analysis in these cases, however, is inapposite to the matter at hand. The CBCT cases were decided in the context of the McFadden Act, 12 U.S.C. § 36(f), a statute restricting the location of branch banks and afforded a broad judicial gloss not applicable to the HOLA. See *Smith,* 534 F.2d at 935-6, fn. 59. The Court finds nothing in the language of the HOLA or its legislative history which similarly forecloses the Board from acting as it has done here. The Court rejects Plaintiff's contention that RSU activity is the functional equivalent

of checking activity and therefore invalid. Plaintiff calls upon the Court to make a policy judgment of the sort better left to the Congress. If RSUs are to be proscribed on the ground that RSUs are the functional equivalents of checks, such a proscription must emanate from the Congress and not the Courts.[10] This Court concludes that Board authorization of RSU services does not violate 12 U.S.C. § 1464(b)(1). See *Bloomfield, supra*, at 388.

For the reasons stated above, the Court finds that Defendants are entitled to judgment herein as a matter of law.

/s/ Aubrey E. Robinson, Jr.
AUBREY E. ROBINSON, JR.
United States District Judge

June 30, 1978
Date

[10] It is noteworthy that Congress has been aware of the Board's RSU program from its inception and has taken no action to prohibit FSLs from offering RSU services. See, e.g., the subcommittee hearings cited in Defendants' brief in support of Defendants' motion for summary judgment, p. 58. Congress' creation of the National Commission on Electronic Funds Transfers on October 24, 1974, in no way interferes with the power of the Board to adopt and implement an RSU regulation. In creating the National Commission, Congress did not impose a moratorium on EFTS activity. Rather, the National Commission has existed to study and report on the problems posed by the new EFTs technology and among its sources has drawn on the RSU experience.

APPENDIX F

STATUTES AND REGULATIONS

Statutes:

1. 12 U.S.C. 371a provides in pertinent part:

   No member bank shall directly or indirectly, by any device whatsoever, pay any interest on any deposit which is payable on demand * * *.

2. 12 U.S.C. 371b [1] provides in pertinent part:

   The [Federal Reserve] Board may from time to time, after consulting with the Board of Directors of the Federal Deposit Insurance Corporation and the Federal Home Loan Bank Board, prescribe rules governing the payment and advertisement of interest on deposits, including limitations on the rates of interest which may be paid by member banks on time and savings deposits. The Board may prescribe different rate limitations for different classes of deposits, for deposits of different amounts or with different maturities or subject to different conditions regarding withdrawal or repayment, according to the nature or location of member banks or their depositors, or according to such other reasonable bases as the Board may deem desirable in the public interest.

   * * * * *

[1] The quoted portion of 12 U.S.C. 371b was enacted in 1966, to be effective for one year (see 80 Stat. 823, 824). The effective date has since been extended on several occasions (see 12 U.S.C. 461 note). The provision is currently effective through December 15, 1980 (92 Stat. 3641, 3713).

3. 12 U.S.C. 461 provides in pertinent part:

(a) The [Federal Reserve] Board is authorized for the purposes of this section to define the terms used in this section to determine what shall be deemed a payment of interest, to determine what types of obligations, whether issued directly by a member bank or indirectly by an affiliate of a member bank or by other means, and, regardless of the use of the proceeds, shall be deemed a deposit, and to prescribe such regulations as it may deem necessary to effectuate the purposes of this section and to prevent evasions thereof.

(b) Every member bank shall maintain reserves against its deposits in such ratios as shall be determined by the affirmative vote of not less than four members of the Board * * *.

4. 12 U.S.C. 1819 provides in pertinent part:

Upon June 16, 1933, the [Federal Deposit Insurance] Corporation shall become a body corporate and as such shall have power—

* * * * *

Tenth. To prescribe by its Board of Directors such rules and regulations as it may deem necessary to carry out the provisions of this chapter.

5. 12 U.S.C. 1828(g) provides in pertinent part:

The Board of Directors [of the Federal Deposit Insurance Corporation] shall by regulation prohibit the payment of interest or dividends on demand deposits in insured nonmember banks and for such purpose it may define the term "demand deposits"; but such exceptions from this prohibition shall be made as are now or may hereafter be prescribed with respect to deposits payable on demand in member banks by section 19 of the Federal Reserve Act, as amended, or by regulation of the Board of Governors of the Federal Reserve System. The Board of Directors may from time to time, after consulting with the Board of Governors of the Federal Reserve System and the Federal Home Loan Bank Board, prescribe rules governing the payment and advertisement of interest or dividends on deposits, including limitations on the rates of interest or dividends that may be paid by insured nonmember banks (including insured mutual savings banks) on time and savings deposits. The Board of Directors may prescribe different rate limitations for different classes of deposits, for deposits of different amounts or with different maturities or subject to different conditions regarding withdrawal or repayment, according to the nature or location of insured nonmember banks or their depositors, or according to such other reasonable bases as the Board of Directors may deem desirable in the public interest. The Board of Directors is authorized for the purposes of this subsection to define the terms "time deposits" and "savings deposits," to determine what shall be deemed a payment of interest, and to prescribe such regulations as it may deem necessary to effectuate the purpose of this subsection and to prevent evasions thereof. * * *

6. 12 U.S.C. 1832 provides in pertinent part:

(a) Withdrawal by negotiable or transferable instruments; exceptions

No depository institution shall allow the owner of a deposit or account on which interest or dividends are paid to make withdrawals by negotiable or transferable instruments for the purpose of making transfers to third parties, except that such withdrawals may be made in the States of Massachusetts, Connecticut, Rhode Island, Maine, Vermont, and New Hampshire.[2]

(b) Definition

For purposes of this section, the term "depository institution" means—

(1) any insured bank as defined in section 1813 of this title;

(2) any State bank as defined in section 1813 of this title;

(3) any mutual savings bank as defined in section 1813 of this title;

(4) any savings bank as defined in section 1813 of this title;

(5) any insured institution as defined in section 1724 of this title; and

(6) any building and loan association or savings and loan association organized and operated according to the laws of the State in which it is chartered or organized; and, for purposes of this paragraph, the term

[2] The state of New York was added to the list of states excluded from the proscription of paragraph (a) of this Section by 92 Stat. 3641, 3712.

"State" means any State of the United States, the District of Columbia, any territory of the United States, Puerto Rico, Guam, American Samoa, or the Virgin Islands.

(c) Fine

Any depository institution which violates this section shall be fined $1,000 for each violation.

7. 12 U.S.C. 1464 provides in pertinent part:

(a) Organization authorized

In order to provide local mutual thrift institutions in which people may invest their funds and in order to provide for the financing of homes, the [Federal Home Loan Bank] Board is authorized, under such rules and regulations as it may prescribe, to provide for the organization, incorporation, examination, operation, and regulation of associations to be known as "Federal Savings and Loan Associations", and to issue charters therefor, giving primary consideration to the best practices of local mutual thrift and home-financing institutions in the United States.

(b) Capital; members of the association; voting rights; payment of savings accounts and withdrawals; nontransferable orders or authorizations; authorization to borrow, give security, act as surety, and issue notes, bonds, debentures, or other obligations

(1) An association may raise capital in the form of such savings deposits, shares, or other accounts, for fixed, minimum, or indefinite periods of time (all of which are referred to in this

section as savings accounts and all of which shall have the same priority upon liquidation) as are authorized by its charter or by regulations of the Board, and may issue such passbooks, time certificates of deposit, or other evidence of savings accounts as are so authorized. * * * Savings accounts shall not be subject to check or to withdrawal or transfer on negotiable or transferable order or authorization to the association, but the Board may by regulation provide for withdrawal or transfer of savings accounts upon nontransferable order or authorization.

8. 12 U.S.C. 1757 provides in pertinent part:

A Federal credit union shall have succession in its corporate name during its existence and shall have power—

(1) to make contracts;

* * * * *

(6) to receive from its members, from other credit unions, from an officer, employee, or agent of those nonmember units of Federal, State, or local governments and political subdivisions thereof enumerated in section 1787 of this title and in the manner so prescribed from the Central Liquidity Facility, and from nonmembers in the case of credit unions serving predominately low-income members (as defined by the Board) payments on shares which may be issued at varying dividend rates, and payments on share certificates which may be issued at varying dividend rates and maturities, subject to such terms, rates, and conditions as

may be established by the board of directors, within limitations prescribed by the Board;

* * * * *

(15) to exercise such incidental powers as shall be necessary or requisite to enable it to carry on effectively the business for which it is incorporated.

9. 12 U.S.C. 1766 provides in pertinent part:

(a) The Board may prescribe rules and regulations for the administration of this chapter (including, but not by way of limitation, the merger, consolidation, and dissolution of corporations organized under this chapter).

10. 12 U.S.C. 1789 provides in pertinent part:

(a) In carrying out the purposes of this subchapter, the Board may—

(11) prescribe such rules and regulations as it may deem necessary or appropriate to carry out the provisions of this subchapter.[3]

Regulations:

1. 12 C.F.R. 217.5(c)(2) and (3) (see 43 Fed. Reg. 20001, May 10, 1978) provides:

Notwithstanding the provisions of subparagraph (1) of this paragraph, withdrawals may be permitted by a member bank to be made auto-

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[3] Pursuant to the Financial Institutions Regulatory and Interest Rate Control Act of 1978, Pub. L. No. 95-630, 92 Stat. 3680, the National Credit Union Administration is now under the management of a three-member National Credit Union Administration Board instead of an Administrator. Mr. Lawrence Connell, who previously served as Administrator, is now Chairman of the Board.

matically or as a normal practice from a savings deposit that consists only of funds in which the entire beneficial interest is held by one or more individuals through payment to the bank itself or through transfer of credit to a demand deposit or other account pursuant to a written authorization from the depositor to make such payments or transfers in order to cover checks or drafts drawn upon the bank or to maintain a specified balance in or to make periodic transfers to such accounts. In accordance with § 217.1 (e)(2), a member bank must reserve the right to require the depositor to give notice in writing of an intended withdrawal not less than 30 days before such withdrawal is made. Such notice shall be prominently disclosed and specifically brought to the depositor's attention at the time the automatic transfer service is authorized. A member bank may not require a depositor to authorize such automatic transfers to be made from savings deposits.

A member bank may permit depositors to maintain deposits subject to negotiable orders of withdrawal where authorized by Federal law.

2. 12 C.F.R. 329.5(c)(2) (see 43 Fed. Reg. 20222, May 11, 1978) provides:

> An insured nonmember bank may permit withdrawals to be made automatically from a savings deposit that consists of funds deposited to the credit of, and in which the entire beneficial interest is held by one or more individuals, through transfer of credit to a demand or other deposit account of the same depositor pursuant to a written agreement between the bank and

> the depositor authorizing such payments or transfers in connection with checks or drafts drawn by the depositor upon the bank, or for any other purpose not prohibited by law or regulation. Interest earned on a savings deposit may be transferred pursuant to the provisions of this subparagraph whether or not the depositor is an individual. In accordance with Section 329.1(e)(1)(iii) of this Part 329, the bank must reserve the right to require the depositor to give notice in writing of an intended withdrawal (transfer) not less than 30 days before such withdrawal (transfer) is made. This reservation shall be expressly set forth in the written agreement authorizing transfers pursuant to this subparagraph. The bank may not require the depositor to enter into an agreement providing for the automatic transfer of savings deposits as a condition to maintaining a savings or other deposit account.

3. 12 C.F.R. 545.4-2 (see 43 Fed. Reg. 22930, May 30, 1978) provides:

> (a) *Definitions.* As used in this section—
>
> (1) "Activator" means a machine-readable instrument used to activate an RSU; a passbook may not be so used.
>
> (2) "Generic data" means statistical information which does not identify any individual accountholder.
>
> (3) "Personal security identifier" (PSI) means any word, number, or other security identifier essential for user access of an account through an RSU.

(4) "Remote service unit" (RSU) means an information processing device, including associated equipment, structures, and systems, by which information relating to financial services rendered to the public is stored and transmitted, instantaneously or otherwise, to a financial institution. Any such device not on the premises of any facility of a Federal association which, for activation and account access, requires use of an activator and PSI in the possession and control of the user, is an RSU.

The term includes, without limitation, both "on-line" computer terminals and "off-line" cash dispensing machines. It excludes automated teller machines on the premises of a Federal association, unless shared with other financial institutions. An RSU is not a branch, satellite, or other type of office, facility, or agency of a Federal association under §§ 545.14, 545.14-1, 545.14-2, 545.14-3, 545.14-4, 545.14-5, 545.15.

(5) "RSU account" means a savings account (including a savings deposit) or loan account which may be accessed through an RSU.

(6) "User" means an RSU accountholder of a Federal association authorized to access an RSU.

(b) *General.* A Federal association may establish or use RSUs in the State of its home office or in the primary service area, as determined by the Board, of any of its out-of-State branches, and may participate in RSU operations with other financial institutions as the Board may approve.

(c) *RSU financial services.* A Federal association's board of directors may, by resolution,

authorize it to offer any of these financial services to the public through RSUs:

(1) Crediting existing savings accounts;

(2) Debiting such accounts up to the available balance therein, provided that no negotiable or transferable order or authorization is used unless permitted by Federal law;

(3) Crediting payments on loans in which the association has an investment or which it is servicing; and

(4) Related financial services as the Board may approve upon application.

(d) *RSU activator.* Each RSU activator shall bear the words "Not Transferable" or their equivalent.

(e) *RSU access techniques.* A Federal association shall provide a PSI to each user and require its use when accessing an RSU; it may not employ RSU access techniques which require the user to disclose a PSI to another person.

(f) *Account agreements.* A Federal association shall clearly disclose in writing to each user before an RSU account is opened, all terms and conditions of the RSU agreement, including rights and obligations in case of loss, theft, or error and the privacy of account information. The association shall also inform each user that:

(1) Loss or theft of the activator should be promptly reported to a person or phone number specified by the association; and

(2) The PSI is for security purposes and should not be disclosed to third parties.

(g) *Service charges.* A Federal association may impose charges for RSU financial services.

(1) *New accounts.* A schedule of charges shall be disclosed in writing to a prospective user before an RSU account is opened.

(2) *Existing accounts.* Users shall be notified in writing 30 days before service charges are initiated or increased by the association.

(h) *Error resolution.* A Federal association shall establish error resolution procedures for RSU accounts, and inform users that:

(1) Written notification of error should be made within 60 days of receipt of the statement;

(2) Resolution of alleged error by correction or written confirmation of the transaction (including copies of any documents relied on by the association) shall be made by the association within 10 business days after receiving such notification.

(i) *Liability for Loss.* A Federal association shall be liable to a user for RSU account losses resulting from the association's:

(1) Failure to carry out the user's transaction order correctly including such failure resulting from prior uncorrected error of the association;

(2) Failure to correct an account error within 10 business days after receiving written notification from the user; or

(3) Processing a transaction order from an unauthorized person, unless the association proves that such action resulted from the user's negligence.

(j) *Account statements.* A Federal association shall issue each user a statement of RSU account transactions monthly if the account has

been used in that time, quarterly if not; such statement shall include at least the date, type, amount, and location of each RSU transaction;

(k) *RSU receipts.* Each RSU must provide to users at the time of an RSU transaction a receipt containing at least the following: Date, type, amount, and location of transaction, and information sufficient to identify the user. A receipt which is manually written must be signed by the user and the RSU operator.

(l) *Privacy of account data.* A Federal association shall allow users to obtain any information concerning their RSU accounts. Except for generic data or data necessary to identify a transaction, no Federal association may disclose account data to third parties, other than the Board or its representatives, unless express written consent of the user is given, or applicable law requires. Information disclosed to the Bank Board will be kept in a manner to ensure compliance with the Privacy Act, 5 U.S.C. 552(a). A Federal association may operate an RSU according to an agreement with a third party or share computer systems, communications facilities, or services of another financial institution only if such third party or institution agrees to abide by this section as to information concerning RSU accounts in the Federal association.

(m) *Bonding.* A Federal association shall take all steps necessary to protect its interest in financial services processed at each RSU, including obtaining available fidelity, forgery, and other appropriate insurance.

(n) *Security.* A Federal association shall protect electronic data against fraudulent altera-

tions or disclosure. All RSUs shall meet the minimum security devices requirements of Part 563a of the Insurance Regulations as though such units were offices, as defined in § 563a.1 of said part, except to the extent that an applicant satisfies the Board that those requirements are inappropriate. Alternate measures satisfactory to the Board must be taken for installation, maintenance, and operation of security devices and procedures, reasonable in cost, to discourage robberies, burglaries, larcenies, and computer theft and to assist in identification and apprehension of persons who commit such acts.

(o) *Competitive implications.* The Board will consider competitive implications of applications made under this section and may, in an appropriate case, (1) request the views of the Antitrust Division of the Department of Justice, (2) request an applicant to obtain a business review letter from such Division under 28 CFR 50.6, and/or (3) require a Federal association to share RSU activities with another financial institution under reasonable terms and conditions. A Federal association may not enter into any agreement for exclusive right to engage in RSU activities at any location(s). A Federal association may not require any person to become an RSU user as a condition of obtaining a loan or any other service offered by the association.

(p) *Applications.*—(1) *General.* A Federal association shall obtain the Board's written approval before entering into any RSU activity or materially altering a previously approved one. Before applying for such approval, a Federal association shall obtain from the Supervisory

Agent written advice that there is no present supervisory objection to such application.

(2) *Start-up date.* A Federal association shall have its approved RSU activity operational no later than 12 months after Board approval, unless the Board grants an extension.

(3) *Filing.* Two copies of any RSU activity application shall be filed with the Supervisory Agent. The original and two copies shall be sent to the Director, Office of Industry Development, Federal Home Loan Bank Board, Washington, D.C. 20552. Additional material may be requested by the Director or the Supervisory Agent. Applicants may file information to supplement or amend applications.

(q) *Board supervision.* Each Federal association which engages in any RSU activity shall be subject to rules and regulations which the Board may hereafter prescribe or any resolution which the Board may adopt, including requirements to terminate or modify such activity, whether engaged in separately or with others. A Federal association may share an RSU controlled by an institution not subject to examination by a Federal regulatory agency only if such institution has agreed in writing that the RSU is subject to such examination by the Board as it deems necessary.

(r) *Reporting.* A Federal association which engages in RSU activities shall submit to the Board, at the association's expense, such reports as the Board may require regarding such activities.

(s) *Exception for previously approved RSU projects.* Paragraphs (d) through (l) and (q)

of this section shall apply beginning January 1, 1979, to Federal associations engaging in RSU activities approved prior to July 1, 1978.

4. 12 C.F.R. 701.34 (see 42 Fed. Reg. 61977, Dec. 8, 1977) provides:

(a) For purposes of this section:

(1) "Share draft" means a negotiable or non-negotiable draft used to withdraw shares from a share draft account.

(2) "Payable through bank" means a bank that has been designated to make presentment of a share draft to the Federal credit union for payment.

(3) "Truncation" means the original share draft is not returned to the member.

(4) "Share draft account" means any regular share account from which the Federal credit union has agreed that shares may be withdrawn by means of a share draft or other order.

(5) "Liquidity reserve" means an allocation of current assets recorded on the credit union's records as cash or deposits and investments as authorized by Section 107 of the Federal Credit Union Act: *Provided,* That, any investments included as a portion of this reserve shall be redeemable within 60 days and have a maturity not in excess of 90 days.

(b) A Federal credit union may provide its members with share drafts. The board of directors shall determine, prior to requesting approval to implement the share draft program, that the members' use of share drafts is economically and operationally feasible for the Federal credit union.

(c) A Federal credit union must submit a written request to operate a share draft program to the Administration at least 60 days prior to the proposed date of implementation. The request shall include:

(1) An official copy of the minutes of the board of directors authorizing a request for approval to implement the share draft program.

(2) All background documentation which supports the board of directors' decision that the members' use of share drafts is economically and operationally feasible for the Federal credit union.

(3) A statement that the forms and procedures to be used have been reviewed by legal counsel.

(4) A statement that the board of directors has determined appropriate surety bond coverage is in force.

(5) A statement of operational specifications which expressly provide for:

(i) Identification of the payable through bank;

(ii) Truncation;

(iii) Establishing a share draft account agreement with each member which outlines the credit union's and member's responsibilities;

(iv) Recording of share overdrafts and giving members notification of such overdrafts should they occur;

(v) Encoding each share draft with the routing and transit number of the payable through bank, the share draft account number, and the serial number of the share draft in accordance with standards required for use in a clearing

system utilizing Magnetic Ink Character Recognition devices;

(vi) Preprinting the name of the payable through bank and the name of the credit union on the share draft;

(vii) A method for each member using share drafts to maintain a record of share drafts drawn;

(viii) Submission of a periodic statement of account, no less frequently than quarterly, to each member who has a share draft account which shall include for each share draft processed the serial number, date of payment and the amount of payment;

(ix) Establishing responsibility for detection of unauthorized or forged drafts;

(x) Procedures for processing stop payment orders;

(xi) Procedures for providing members with copies of paid drafts should copies be requested;

(xii) Procedures for retaining paid drafts or copies of paid drafts on file for a period of five years or as required by state law, whichever is greater;

(xiii) The fees, if any, to be charged, provided such fees shall not exceed the direct and indirect costs of providing the service; and

(xiv) Procedures for establishing and maintaining an average daily liquidity reserve equal to 125 per cent of the aggregate amount paid on share drafts during the preceding month divided by the number of days on which share drafts were paid during that month.

(d) A Federal credit union may not commence operating a share draft program until it

has received written approval from the Administration, which may limit member participation for a period not to exceed one year. Approval will not be given if:

(1) The requirements of paragraph (c) of this section have not been met;

(2) The supervisory committee has not fulfilled its statutory requirements as specified in the Federal Credit Union Act; or

(3) The management of the credit union has demonstrated through prior performance its inability to handle the additional activity the share draft program will generate.

(e) (1) The Federal credit union shall notify the Administration in writing, at least 60 days in advance of its proposed implementation date, of any modification relating to:

(i) The payable through bank;

(ii) Truncation procedures;

(iii) The share draft agreement;

(iv) Procedures for establishing and maintaining a liquidity reserve; and

(v) Any material modification not previously reviewed and approved by the Administration.

(2) Implementation of a modification is contingent upon written approval of the Administration.

(3) The Federal credit union shall immediately notify the Administration as to any matter affecting the information provided pursuant to paragraphs (c) (1) through (c) (4) of this section.

(f) If a share draft program or a request for modification is not approved, or the share

draft program is approved for limited member participation, the Administration will provide to the requester a written notice setting forth the basis for such action.

(g) A Federal credit union shall not waive the right to require notice as set forth in the bylaws, but may guarantee payment of a share draft provided that:

(1) A specific guarantee authorization is obtained for the share draft from the Federal credit union; and

(2) The guarantee authorization is immediately noted on the share draft account to prevent the withdrawal of shares needed to pay the guaranteed share draft.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 79-278

LAWRENCE CONNELL, CHAIRMAN OF THE NATIONAL CREDIT UNION ADMINISTRATION BOARD, ET AL.,
Petitioners

v.

AMERICAN BANKERS ASSOCIATION, ET AL.

FEDERAL HOME LOAN BANK BOARD, ET AL.,
Petitioners

v.

INDEPENDENT BANKERS ASSOCIATION OF AMERICA

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, ET AL., *Petitioners*

v.

UNITED STATES LEAGUE OF SAVINGS ASSOCIATIONS

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia

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BRIEF FOR RESPONDENT INDEPENDENT BANKERS ASSOCIATION OF AMERICA IN OPPOSITION

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INDEX

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit, which is not reported, is attached as Appendix A to the Petition. The

opinion of the United States District Court for the District of Columbia in *Independent Bankers Association of America* v. *Federal Home Loan Bank Board, et al.*, also unreported, is attached as Appendix E to the Petition.

JURISDICTION

The jurisdictional requisites are set forth in the Petition.

QUESTION PRESENTED

Whether utilization of off-premise computer terminals by customers of federal savings and loan associations for withdrawal and transfer of savings funds violates the express statutory prohibitions in Section 5(b)(1) of the Home Owners' Loan Act of 1933, 12 U.S.C. § 1464(b).

STATUTES AND RULING INVOLVED

The relevant provisions of the Home Owners' Loan Act of 1933, 12 U.S.C. § 1464, are attached as Appendix F to the Petition. The regulation of the Federal Home Loan Bank Board, 12 C.F.R. 545.4-2, is attached as Appendix F to the Petition.

STATEMENT

The three cases which are the subjects of the Petition,[1] were disposed of by the court of appeals in a single opinion and judgment, entered on April 20, 1979. The cases were not consolidated and were separately briefed, but by order of the court, were argued successively before the same panel on the same day. Although in its opinion the court of appeals cited factual and legal similarities among the three cases, it dealt with the challenged regulation in each case separately and specifically.

[1] *American Bankers Association* v. *Connell, et al.*, ("Credit Union appeal"); *IBAA* v. *Federal Home Loan Bank Board, et al.* ("Bank Board appeal"); *United States League of Savings Associations* v. *Board of Govenors of the Federal Reserve System, et al.* ("Federal Reserve Board appeal").

The court found generally that, "in each instance [fund transfers authorized by the regulations] represents the use of a device or technique which was not and is not authorized by the relevant statutes . . .";[2] and specifically that, regarding the Bank Board case, "Remote Service Units . . . are in violation of the prohibition against checking accounts contained in Section 5(b)(1) of the Home Owners' Loan Act of 1933 . . .",[3] and ordered that 12 C.F.R. § 545.4-2 (the "RSU Regulation") be vacated and set aside.

Respondent Independent Bankers Association of America ("IBAA") submits that the court's decision was correct, both generally with respect to all three cases, and specifically in the Bank Board case. The court refused to confine itself to viewing the cases as isolated instances in which only the literal language of the relevant statutes was interpreted. Rather, the court examined the legislative history of the creation of each of the three types of financial institutions in the three cases, as well as the legislative history of each of the challenged regulations, and determined that the original statutory scheme of specialization of financial institutions was being frustrated, without benefit of Congressional consideration.

[2] Pet. App. A, 2a-3a.

[3] Pet. App. A, 3a-4a.

The court declined to rewrite statutory language to accommodate the regulations, and refused to make policy judgments concerning overall public interest. The court came to only one conclusion: the methods of funds transfer authorized by regulation in each case was beyond the statutory authority of the regulators. By staying the effective date of its Order, the court offered Congress the opportunity to consider providing that authority. Because the court of appeals was correct in its assessment of the facts and law in each of the cases, and because there is no contrary appellate authority, its comprehensive decision should not be disturbed.

ARGUMENT

I. The Decision Below Is Correct—RSU Withdrawal and Transfer Transactions Are Checking Account Transactions Within The Language and Intent Of The Statutory Prohibition

The issue presented to the court of appeals in the Bank Board case was whether the Bank Board had exceeded its statutory authority in authorizing federal savings and loan associations ("FSL's") to establish a means by which customers may withdraw and transfer funds on deposit in FSL savings accounts at locations other than authorized FSL offices. IBAA argued that (1) the authority given FSL's by the RSU Regulation was in clear conflict with the statutory purposes of FSL's as expressed in Section 5(a) of the Home Owners' Loan Act of 1933 ("HOLA"); and (2) RSU type transactions are specifically prohibited to FSL's by the prohibition against checking accounts in Section 5(b)(1) of the HOLA.

The court specifically found that RSU's permit transactions by "a device functionally equivalent to a

check", and were therefore prohibited by the express prohibition against checking accounts in Section 5(b)(1) of the HOLA. This finding was based on a reading of the specific language and intent of the prohibition, against the background of (1) the legislative history of the creation of FSL's; (2) the legislative history of the prohibition; and (3) a practical understanding of the way in which modern technology has changed the form of delivering traditional financial services, without changing the substance.

The undisputed facts established that the results achieved by the use of RSU's were contrary to the statutory purposes of FSL's, and inconsistent with the overriding policy considerations expressed by Congress in Section 5(a) of the HOLA. RSU's permit FSL's to offer deposit accounts which are substantively the same as prohibited bank checking accounts. In a 1968 amendment to Section 5(b)(1) of the HOLA, Congress expressly reiterated its prohibition against checking accounts for FSL's. The Board's attempt to circumvent that express prohibition failed because it relied only on the form of an RSU transaction rather than its substance.

The use of RSU's permits FSL's to offer services which they have never before offered. Through the use of RSU's, FSL customers may order withdrawal and transfer of, and receive savings funds at places other than FSL offices. Like bank checking account customers, FSL customers may receive cash withdrawals from merchants, or may pay for goods or services at the point of sale by permitting the FSL to pay the merchant out of funds withdrawn from the customer's FSL savings account. This service is virtually indistinguishable from that offered bank customers through

use of identical electronic funds transfer terminals, services which have been found to be the functional equivalent of checking account services.

The Bank Board argued that in 1933 Congress gave the Board discretionary authority broad enough to effect this revolutionary change by administrative regulation. The court found this argument contrary to the history of the development of separate specialized financial institutions, and the separate statutory authority Congress expressly granted to each.

Alternatively, the Board argued that in the last phrase of the last sentence in the 1968 amendment to Section 5(b)(1) of the HOLA, Congress affirmatively granted the Board the authority to permit the use of RSU's. The Board made this argument without any case authority, and without a single supporting reference to a single Congressional document or report, and in the face of overwhelming contrary evidence.

The restrictive language in Section 5(b)(1) of the HOLA was clearly intended to maintain the permanent distinction between FSL's and commercial banks, by expressly denying FSL's the authority to offer customers the ability to effect withdrawal and transfer of savings funds on demand at places other than FSL offices. RSU's are intended to, and do, make FSL savings funds accessible at virtually any location, in the same way as checking account funds. The "check" is merely the means used by banks to attain the desired objective of payment of funds to its customer. The plastic card used in an RSU transaction serves the same purpose. RSU's offer the same service of immediate access to customer accounts in a manner dispensing with underlying paper such as checks.

Petitioner argues that the court erred in not relying on UCC definitions of "check" and "negotiable instrument" in analyzing an RSU electronic funds transfer ("EFT") transaction. The applicability of the UCC and the functional equivalence of EFT transactions to commercial bank checking account transactions, was previously considered in depth by the D.C. Circuit in *IBAA* v. *Smith,* 534 F.2d 921, *cert. denied,* 429 U.S. 862 (1976), and by three other courts of appeal in identical cases.[4] All four courts unanimously held that the UCC did not apply, and that bank-operated EFT terminals[5] which effectuated withdrawals and transfers, "paid checks", although no paper instrument was used.

Although *Smith* and the other CBCT cases involved national banks, not federal savings and loan associations, they did involve: (1) routine financial transactions accomplished at EFT terminals; (2) a necessary judicial interpretation of Congressional intent in for-

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[4] *Colorado ex rel. State Banking Board* v. *First National Bank of Fort Collins,* 394 F.Supp. 979 (D. Colo., 1975), *aff'd. in part, rev'd. in part,* 540 F.2d 497 (C.A. 10, 1976), *cert. denied,* 429 U.S. 1091 (1977); *Missouri ex rel. Kostman* v. *First National Bank in St. Louis,* 405 F.Supp. 733 (E.D. Mo., 1975), *aff'd.,* 538 F.2d 219 (C.A. 8), *cert. denied,* 429 U.S. 941 (1976); *Illinois ex rel. Lignoul* v. *Continental Illinois National Bank & Trust Co.,* 409 F.Supp. 1167 (N.D. Ill., 1975), *aff'd. in part, rev'd. in part,* 536 F.2d 176 (C.A. 7), *cert. denied,* 429 U.S. 871 (1976).

[5] Bank-operated EFT terminals, generically, are called "Customer-Bank Communication Terminals," or "CBCT's", and are more commonly known as "24-Hour Tellers." A transaction accomplished at an RSU of a federal savings and loan association is identical to a transaction accomplished at a CBCT of a commercial bank. The same manufacturers supply the same terminal equipment, and any differences are due only to individual institutional programming, not to the type of institution using the terminal. In fact, very often a FSL will "share" an EFT terminal with a commercial bank, allowing customers of both institutions equal access.

mulating relevant statutory prohibitions; and (3) public policy considerations related to electronic funds transfer. Those cases were clearly relevant for the manner in which the courts analyzed the functional nature of an EFT transaction, and the way the relevant statute was applied to the substance of the transaction, giving primary consideration to Congressional intent. In this case, the court was again asked to analyze the functional nature of an identical EFT transaction and apply to it the relevant statute in light of Congressional intent.

The issue in the CBCT cases, as in this case, was whether the substance of the express Congressional restriction was being violated by the regulatory agency through use of EFT. Consistently, the courts in all cases held that it was.

The majority of the Bank Board's arguments were devoted to justifying the necessity for the RSU Regulation, rather than supporting its legality. Unable to sustain the legality of the Regulation, the Board relied instead on the usefulness and attractiveness of the RSU services to consumers, and on the alleged need for federal savings and loans to offer these services to effectively compete with commercial banks. To the same effect is the argument by *amicus curiae* San Diego Federal Savings and Loan Association.

The alleged competitive necessity for the Board's action in adopting the RSU Regulation was, however, not at issue. As the court recognized, those are arguments for statutory amendment, and are better addressed to the Congress. The issue is the present statutory authority of the Board to permit FSL's to offer checking account services through use of RSU's and,

as the court found, that authority is simply not presently contained in the HOLA. No amount of justification based on the need for, or value of these services can substitute for that lack of statutory authority, nor can it overcome specific Congressional intent to prohibit the offering of those services.

II. Congress Is Considering Enabling Legislation

Petitioner has informed the Court that there are two bills introduced in Congress which propose to expressly sanction RSU transactions for FSL's, as well as share drafts for federal credit unions and automatic transfer services for commercial banks. (Pet. brief, p. 19, fn. 6.) H.R. 4986, 96th Cong., 1st Sess. (1979) ("Consumer Checking Account Equity Act of 1979"), was passed by the House on September 10, 1979. Section 4 of the bill amends Section 5(b)(1) of the HOLA by adding a concluding sentence: "This section does not prohibit the establishment of remote service units by associations in accordance with regulations prescribed by the Board."

Three companion bills have been introduced in the Senate, all of which would expressly sanction RSU's and the other services, by statutory amendment. S. 1347, S. 1729, S. 1627, 96th Cong., 1st Sess. (1979).

The court set aside the regulations in all three cases for the same reason. Namely, that offering the challenged services required Congressional, not administrative, authorization. The court stayed the effectiveness of its Judgment until 1 January 1980, "in the expectation that the Congress will declare its will upon these matters." Should enabling legislation be enacted by Congress and signed by the President prior

to the expiration of the stay, the issue in this case will be moot. Should no statutory amendment become law prior to the expiration of the stay, then Congress has, after consideration, decided to allow the Bank Board and the other agencies to accept the consequences of the court's decision.

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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September 21, 1979

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No. 79-278

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

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FEDERAL HOME LOAN BANK BOARD, ET AL.,
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v.

INDEPENDENT BANKERS ASSOCIATION OF AMERICA,

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, ET AL.,
Petitioners,

v.

UNITED STATES LEAGUE OF SAVINGS ASSOCIATIONS,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF RESPONDENT UNITED STATES LEAGUE OF SAVINGS ASSOCIATIONS IN OPPOSITION

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---

BRIEF OF RESPONDENT UNITED STATES LEAGUE OF SAVINGS ASSOCIATIONS IN OPPOSITION

The respondent United States League of Savings Associations respectfully requests that this Court deny the petition for a writ of certiorari seeking review of the judgment of the United States Court of Appeals for the District of Columbia Circuit in the case of *United States League of Savings Associations v. Board of Governors of the Federal Reserve System, et al.* The judgment, which is unpublished, is reproduced as Appendix A to the petition.

The Federal Reserve Board and Federal Deposit Insurance Corporation regulations invalidated by the court of appeals in this case represented a fundamental reversal by those agencies of long-standing limitations on commercial banking practices in the United States. For the first time, each of the financial institutions regulated by these petitioners would have been permitted to allow individuals to maintain all of the funds upon which they normally drew checks in an interest-bearing savings account, and to draw upon those funds by writing checks on a zero-balance checking account, which would trigger an automatic transfer from the savings account to the checking account of amounts sufficient to cover the checks.

Authorization of such automatic funds transfer (AFT) schemes—historically considered illegal by these agencies—would have given commercial banks a powerful new weapon in their competition for savings customers with the savings and loan institutions represented by respondent, because savings and loan associations generally cannot offer checking accounts and (with limited exceptions) are not permitted to allow savings account holders to make withdrawals from their accounts by check.

As the court of appeals (and the district court) recognized, the hybrid AFT account created by these regulations is indistinguishable in any real sense from an interest-bearing checking account or a savings account upon which checks may be written (Petition App. A p. 3a; App. C p. 25a), each of which Congress expressly has forbidden.* Congress has declared (1) that interest is not to be paid on checking accounts "directly, or indirectly, by any device whatsoever . . ." (12 U.S.C. 371a) and (2) that in 43 of the 50 States, "no depository institution shall allow the owner of a deposit or account on which interest or dividends are paid to make withdrawals by negotiable or transferable instruments for the purpose of making transfers to third parties." (12 U.S.C. 1832).

---

* Petitioners misleadingly assert (Petition p. 15 n.4) that Congress has approved AFT plans in the recently enacted Financial Institutions Regulatory and Interest Rate Control Act of 1978, 92 Stat. 3641. That is far from the truth. Petitioners made the same argument in the District Court, which concluded, after an examination of legislative history expressly addressing the legality of AFT plans, that the Act "cannot be viewed as in any way dispositive of the legal questions raised by AFT services." (Petition App. C p. 30a).

REASONS WHY THE WRIT SHOULD BE DENIED

Although the three cases the Solicitor General seeks to bring to this Court were decided by a common judgment in the court of appeals, they were not consolidated for any purpose in the proceedings below. Each involves different facts, different regulations and, ultimately different legal issues, requiring that they be separately viewed. That especially is true of the instant case which, unlike its companions, turns on the application of direct statutory prohibition that delimits the administrative authority of the petitioning agencies—and which is not to be "overridden in the view that Congress intended it to be ignored." *Leedom v. Kyne*, 358 U.S. 184, 189 (1958), quoting from *Texas & New Orleans R. Co. v. Railway Clerks*, 281 U.S. 548 (1930). Petitioners would have the Court so ignore the will of Congress in this case.

No one seriously disputes that petitioners' AFT regulations would effectively erase any practical difference between checking accounts and savings accounts. As the court of appeals held, AFT accounts would, in effect, constitute either interest-bearing checking accounts or savings accounts upon which checks could be written—each of which in its overt form is unlawful. The court of appeals found the AFT regulations to be an "indirect device" for the payment of interest on demand deposits in violation of the long-standing congressional proscription against the payment of interest on such deposits "directly, or indirectly by any device whatsoever . . ."—a conclusion by the court that would seem dictated by its obligation to give clear and unambiguous statutory language full effect in accordance

with its meaning, *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 184 (1978), *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 197 (1976), and its obligation to assure that administrative regulations do not create a rule out of harmony with the statute they are intended to implement, *Manhattan General Equip. Co. v. Commissioner*, 297 U.S. 129, 134 (1936). On the other hand, protestations that AFT plans preserve the formalities of two accounts and a reserved right to notice of withdrawal (see Petition pp. 13-15) could save petitioners' regulations only if the language of the statute relied upon by the court of appeals is assiduously ignored.

Even if it could be said that the 30-day notice provision of petitioners' regulations serves to distinguish AFT accounts in some significant respect from interest-bearing demand deposits, it does not save them from violation of 12 U.S.C. 1832, which prohibits withdrawals by negotiable instrument from savings deposits. Savings deposits always are, and always have been, subject to the 30-day notice requirement.

That the court of appeals disregarded the formal trappings of AFT plans and judged their legality on the basis of their substance and the realities of their operation is not remarkable. This Court took the same approach under analogous circumstances in *First National Bank in Plant City v. Dickenson*, 396 U.S. 122, 137 (1969), as did the District of Columbia Circuit in *Independent Bankers Ass'n v. Smith*, 175 U.S. App. D.C. 184, 534 F.2d 921 (1976), *cert. denied*, 429 U.S. 862 (1976).

In adopting the regulations at issue in this case, the Federal Reserve Board and the FDIC stretched their statutory authority beyond the breaking point. The

authority by which petitioners claim to have acted in this case was granted them by Congress with the intention that a meaningful distinction be maintained between demand deposits and savings deposits. See 1936 Fed. Res. Bull. 191; *Regulation Q NOW Accounts: Hearings on H.R. 4070, H.R. 4719 and H.R. 4988 Before the Subcomm. on Bank Supervision and Insurance of the House Comm. on Banking and Currency*, 93rd Cong., 1st Sess. 240 (1973). As the court of appeals recognized (Petition App. A pp. 4a-6a), if these distinctions and the public policy they embody have outlived their usefulness, the task of changing them falls to Congress, not the courts.*

* In response to the court of appeals' ruling three bills were introduced in Congress that would, *inter alia*, grant petitioners the authority to permit commercial banks to offer AFT plans. H.R. 4986 (formerly H.R. 3864), 96th Cong., 1st Sess. (1979); H.R. 4305, 96th Cong., 1st Sess. (1979); S. 1347, 96th Cong., 1st Sess. (1979). The House passed H.R. 4986 on September 11, 1979. The comments of Rep. St. Germain (Chairman of the Financial Institutions Subcommittee of the House Banking Committee) and Rep. Annunzio (Chairman of the Consumer Affairs Subcommittee of the House Banking Committee) in introducing their bills (H.R. 3864 and H.R. 4305, respectively) are worth noting:

> Mr. St. Germain: "Faced with outmoded restrictions, banks, thrift institutions, and regulators have been forced to come up with a variety of gimmicks as thinly disguised efforts to circumvent statutory hobbles surrounding checking accounts. The court has now ruled these complex sets of gimmicks illegal and has clearly suggested that the Congress set a policy on checking accounts and interest payments on such accounts." 125 Cong. Rec. H2506 (daily ed. May 1, 1979)
>
> Mr. Annunzio: "I do not quarrel with the court's decision because, quite frankly, I think the court was totally correct in its findings, and in fact, I had suggested when the automatic transfer services were first suggested by the Federal Reserve Board that such new powers were clearly illegal. I pointed out at that time that this action marked another attempt by a Federal agency to legislate on its own." 125 Cong. Rec. H4075 (daily ed. June 5, 1979).

CONCLUSION

For the reasons stated herein, the petition for a writ of certiorari in the case of *United States League of Savings Associations v. The Board of Governors of the Federal Reserve System, et al.* should be denied.

Respectfully submitted,

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September 1979

IN THE

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FEDERAL HOME LOAN BANK BOARD, et al.,
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v.

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BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, et al., *Petitioners*

v.

UNITED STATES LEAGUE OF SAVINGS ASSOCIATIONS

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

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INDEX

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UNITED STATES LEAGUE OF SAVINGS ASSOCIATIONS

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

RESPONDENTS' BRIEF IN OPPOSITION

The respondents, American Bankers Association and Tioga State Bank, respectfully request that this Court deny the petition for writ of certiorari by which the petitioners seek review of the judgment rendered in

this case by the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The judgment of the court of appeals is unpublished [1] but appears in Appendix A at page 1a. The memorandum and opinion of the district court in this case is reported *American Bankers Association* v. *Connell,* at 447 F. Supp. 296 (D.D.C. 1978), and appears in Appendix B at page 8a.

JURISDICTION

The respondents accept the jurisdictional statement in the petition.

QUESTIONS PRESENTED

A. These respondents abstain from commenting on Questions 1 and 3 as presented by the petitioners, as they are not relevant to the only case in which the respondents were parties below.

B. These respondents submit that Question 2 as presented by the petitioners is not properly before the Court. Whether the National Credit Union Administration may promulgate rules governing the ability of credit union members to withdraw funds from an account by means of *a* draft was not an issue below and was not decided below. What was at issue below was the legality of the form of account from which withdrawals could be made—the functional equivalent of an interest-bearing checking account—and the legality of a specific kind of draft, the Federal credit union share draft.

[1] The fact that the district court's decision was vacated and set aside is reported as a "Decision without Opinion" at 595 F.2d 897 (D.C. Cir. 1979).

C. These respondents present instead the following Question:

> Whether the Federal Credit Union Act can be read to authorize share drafts and share draft accounts in the absence of a specific enumerated power, and in the face of contrary legislative and administrative history.

STATUTES AND REGULATIONS INVOLVED

The pertinent statutes and regulations are set forth in Appendix C at page 18a.

STATEMENT OF THE CASE

The Federal credit union share draft program was created as an "experiment" in 1974. Share drafts are paper instruments physically and functionally resembling commercial bank checks in most relevant respects. A Federal credit union member uses share drafts to pay bills or obtain cash in exactly the same fashion as a commercial bank customer uses checks. However, Federal credit union share draft accounts differ from checking accounts in one important way. The former earn dividends or interest; the latter do not because commercial banks are prohibited from paying interest on such accounts by federal law. 12 U.S.C. §§ 371a, 1828(g) and 1832 (1976).

The National Credit Union Administration agreed to conduct rulemaking proceedings on the share draft program only after a lawsuit was filed challenging the legality of the program.[2] That suit was dismissed with-

[2] *American Bankers Association* v. *Montgomery,* No. 76-1661 (D.D.C., filed Sept. 7, 1976) (dismissed without prejudice, Feb. 1, 1977).

out prejudice on motion of the plaintiffs when NCUA agreed to a moratorium on the approval of new "experimental" programs while rulemaking was conducted. A proposed rule was published February 28, 1977; hearings were held and written comment received on it. The final regulation was published December 8, 1977, and the present litigation was instituted the following day.

Despite the lengthy administrative and judicial proceedings in this case, the Federal credit union share draft program has continued to grow. Participating Federal credit unions now hold some $783 million in share draft accounts,[3] largely at the expense of commercial banks which have not been able to overcome the very considerable problem of trying to compete with an interest-bearing transaction account when the law prevents them from paying interest on comparable accounts. That kind of "competition" has been unfair to commercial banks and, as the court of appeals has found, illegal.

REASONS FOR DENYING THE PETITION

Probably the best reason for denying this petition for a writ of certiorari is that the petitioner has advanced no good grounds for granting it. On the facts and the law, this case is of insufficient importance to warrant the attention of this Court.

[3] Petition for Certiorari, p. 11.

1. In All Likelihood, Even A Decision By The Supreme Court On The Merits Of This Case Would Not Be Dispositive Of The Question Of The Legality Of Federal Credit Union Share Drafts In View Of Pending Legislation.

In the judgment rendered below, the court of appeals stayed the effect of its order until January 1, 1980, in order that the Congress of the United States might give or deny to Federal credit unions the authority to offer share draft accounts or comparable accounts. It is in that forum that the issue should be settled. The court wrote its judgment

> with the firm expectation that the Congress will speedily review the overall situation and make such policy judgment as in its wisdom it deems necessary by authorizing in whole or in part the methods of fund transfer involved in this case or any other methods it sees fit to legitimize, or conversely, by declining to alter the language of existing statutes, thus sustaining the meaning and policy expressed in those statutes as now construed by this court. Appendix A, p. 5a.

The court of appeals entered its judgment on April 20, 1979. Almost immediately, Congress began to take up the issue: various bills were introduced and hearings were held. On September 11,[4] the House of Representatives passed a bill designed to legitimize, effective December 31, 1979, the services of all three forms of financial institutions which were disallowed by the court of appeals. Additionally, on September 30, 1980, all depository institutions will be authorized to offer

[4] 125 Cong. Rec. H7605-06 (daily ed. Sept. 10, 1979) and 125 Cong. Rec. H7650-51 (daily ed. Sept. 11, 1979).

NOW accounts.[5] As this brief is being prepared, the Senate Banking Committee is engaged in an executive session considering comparable legislation. In short, Congress shows every inclination to vote up or down the public policy issues involved in the share draft question before the January 1, 1980 deadline set by the U.S. Court of Appeals for the District of Columbia Circuit.

As a result of these legislative developments, the petitioners gain nothing by attempting to premise the "importance" of this case upon the amount of money involved. It is apparent that the fate of existing share draft programs will be determined one way or the other by Congress, and that is as it should be. If Congress does authorize share drafts or something comparable for Federal credit unions, then the decision of the court of appeals will have no factual effect whatsoever; if Congress refuses to authorize share drafts, then certainly the court of appeals is correct in saying that such a failure would "sustain . . . the meaning and policy expressed in [the] statutes as now construed by [the] court." Appendix A, p. 5a.

When Congress is asked to overrule by legislation some earlier interpretation of a statute and declines to do so, that fact is taken into account in the court's later interpretation of the statute. ***T.I.M.E., Inc.*** v. ***United States,*** 359 U.S. 464, 478 (1959). Congress now has the issues actively under advisement, and the respondents at least are reticent to predict the outcome of the legislature's deliberations. It is, we respectfully

[5] NOW accounts are interest-bearing transaction accounts now limited by law to depository institutions in New England and New York. The statutory definition of "depository institution" does not include credit unions.

suggest, premature for the Court to consider the issues now, prior to imminent Congressional action on the subject.

2. The Petition Raises No Novel Or Important Questions Of Law, Nor Would A Decision On The Merits Of This Case By The Supreme Court Resolve Any Pending Disputes In The Lower Courts Or Any Conflicts Between The Circuits.

As indicated above, this case may be factually important, but to the extent that it is, it will be resolved by Congress. However, the case presents no important question of federal law which should be decided by this Court. The ultimate question, whether share drafts are lawful under the Federal Credit Union Act, as it is now written, is a one-time issue. *See* Petition, p. 12. It has not arisen before this case, and will not arise again.

But even though this case may technically be one of first impression, it was decided by the court of appeals by the judicious—and correct—application of settled and undisputed principles of law. Mr. Justice Stevens has written that "the Court seldom takes a case merely to reaffirm settled law." ***Estelle*** v. ***Gamble,*** 429 U.S. 97, 115 (1976) (Stevens, J., dissenting). The court of appeals recognized this as well. That court has specifically directed that the decision not be published. That is done only when the issues do not warrant full opinions. *See* Rule 13(c) of the General Rules of the U.S. Court of Appeals for the District of Columbia Circuit.

The petitioners maintain that the court of appeals failed to accord due deference to the regulatory agency interpretation of its own governing statute. Petition, p. 12. Nothing in the decision of the court of appeals is inconsistent with the doctrine of "due deference."

In fact there are numerous well-established exceptions to it. For example, the court will not grant deference to an agency interpretation of a statute where there are compelling indications that the interpretation is wrong. *Espinoza* v. *Farah Manufacturing Co.*, 414 U.S. 86 (1973). One of the "compelling indications" is a prior inconsistent agency position on the same subject, rendered more nearly contemporaneously with the enactment of the statute. *General Electric Co.* v. *Gilbert*, 429 U.S. 125 (1976). Such a prior inconsistent opinion appears in the records of this case. A predecessor to Mr. Connell held in 1971 that Federal credit unions were limited to accepting traditional savings-type accounts. [1973] *Credit Union Guide (P-H)*, ¶ 15,126.3. Notwithstanding this earlier interpretation of the law, the NCUA determined that "untraditional" checking-type share draft accounts were legal, and the agency, therefore, authorized such accounts in the regulation here in issue. *See* 42 Fed. Reg. 11247-48 (1977).

Another "compelling indication" is contrary legislative history. *General Electric Co.* v. *Gilbert, supra.* The court of appeals here found that the "history of laws regulating financial institutions . . . demonstrates an intent on the part of Congress not to authorize federal credit union share draft programs." Appendix A, p. 4a, n. 2.

That determination was more than amply supported by the record. The original 1934 Federal Credit Union Act was specifically designed to promote thrift among credit union members and to provide a source of credit for provident and productive purposes,[6] whereas the share draft rule creates a volatile form of account in-

[6] 78 Cong. Rec. 7259 (1934) (remarks of Sen. Sheppard).

herently inimical to the concept of thrift and one which does not contribute to the "source of credit" available to credit union members as administered. At substantially the same time that the Federal Credit Union Act was enacted, Congress also enacted legislation prohibiting the payment of interest on demand deposits. That law was applicable only to commercial banks, demonstrating quite clearly that Federal credit unions had no comparable power. If Federal credit unions had had such power, then the prohibition would have applied to those institutions as well. The same law eliminated the demand deposit powers of Postal Savings Banks so that those "consumer oriented" institutions would not have an unfair competitive advantage over the commercial banks no longer able to pay interest on demand deposits.[7]

A 1959 amendment to the Federal Credit Union Act authorized the sale of checks and money orders by credit unions to their members. This amendment was adopted only after Congress was assured that such a limited power would not put Federal credit unions in competition with commercial banks.[8]

In 1965[9] and 1969,[10] legislation was introduced in Congress which would have authorized demand deposit accounts for Federal credit unions. These bills would hardly have been introduced if the credit unions already had the powers the bills would have granted to them. Neither bill passed.

[7] 77 Cong. Rec. 4168-69 (1933) (remarks of Sen. Connally).

[8] Hearings on S. 1786, S. 1985 and H.R. 8305 Before the Senate Committee on Banking & Currency, 86th Cong., 1st Sess. 57 (1959).

[9] H.R. 8199, 89th Cong., 1st Sess. (1965).

[10] H.R. 29, 91st Cong., 1st Sess. (1969).

In 1973, Congress enacted P.L. 93-100, the NOW account legislation which permitted customers to use negotiable instruments to make withdrawals from interest bearing accounts at certain financial institutions in Massachusetts and New Hampshire. Subsequent legislation extended NOW accounts to five additional states. 12 U.S.C. § 1832 (1976). Credit unions were specifically and deliberately excluded from participation in the NOW account program.[11]

Between 1975 and April 20, 1979, at least five bills were introduced in Congress, any one of which would have bestowed upon credit unions some form of transaction account powers. In every instance, Congress failed or refused to pass the legislation. Even now, Congress is not considering the share draft program in a vacuum. If Congress authorizes share drafts at all, it will only be in conjunction with some comparable or offsetting authority to be granted to other forms of financial institutions at the same time so that unfair competition will not result—something that NCUA could not and cannot do.

The petitioners argue that "nothing in the Federal Credit Union Act or any other statute prohibits federally chartered credit unions from using checks or check-like instruments to facilitate customer withdrawals or payments to third parties." Petition, p. 16. In concluding that the absence of a specific statutory prohibition was not controlling, the court of appeals carefully adhered to well- and long-settled principles enunciated by this Court. In *Thomas* v. *West Jersey*

[11] *See* 119 Cong. Rec. 28074 (1973) (remarks of Rep. Patman); Hearings Before the Senate Banking Committee, 93rd Cong., 1st Sess. 3 (1973) (statement of Sen. McIntyre).

Railroad Co., 101 U.S. 71, 82 (1880), the Court held that

> the powers of corporations organized under legislative statutes are such and such *only* as those statutes confer. Conceding the rule applicable to all statutes, that what is fairly implied is as much granted as what is expressed, it remains that the charter of a corporation is the measure of its powers, and that the enumeration of these powers implies the exclusion of all others. (Emphasis supplied.)

Finally, the petitioners claim that there is "sufficient statutory basis for the NCUA's share draft regulation." (Petition, p. 16, citing the "contract power" of federal credit unions,[12] the implied powers clause of the Federal Credit Union Act,[13] and the rulemaking powers of the NCUA.[14])

Obviously, reliance on the "contract power" begs the question. Credit unions, like any other entity, have only the power to enter into those contracts having a legitimate end. Whether the end, the creation of a share draft account, is or is not legitimate has been the whole issue in this case.[15]

With respect to the implied powers of credit unions and the rulemaking powers of the agency, the court of

[12] 12 U.S.C. § 1757(1) (1976).

[13] 12 U.S.C. § 1757(15) (1976).

[14] 12 U.S.C. § 1766(a) (1976).

[15] Even the district court, which otherwise ruled in favor of the petitioners' position, rejected the argument that the "contract power" provided authority for the share draft program. *American Bankers Association* v. *Connell, supra* at 299, Appendix B, p. 12a, n. 4.

appeals found that the statutory provisions granting those powers were insufficient to justify share draft accounts. In doing so, the court again followed unchallenged law and precedent. This Court has held that there are limits to rulemaking power of an agency:

> The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is . . . [only] the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity. *Manhattan General Equipment Co.* v. *Commissioner,* 297 U.S. 129, 134 (1936).

There are comparable limitations upon the exercise of "implied powers" of statutory creations, long recognized by the courts:

> [A] national bank's activity is authorized as an incidental power, "necessary to carry on the business of banking," within the meaning of 12 U.S.C. § 24, Seventh, if it is convenient or useful *in connection with the performance of one of the bank's established activities pursuant to its express powers* under the National Bank Act. *If this connection between an incidental activity and an express power does not exist, the activity is not authorized as an incidental power. Arnold Tours, Inc.* v. *Camp,* 472 F.2d 427, 432 (1st Cir. 1972). (Emphasis supplied.)

The court of appeals, therefore, did nothing other than determine that the share draft rule is "out of harmony" with Congressional intent, and that the share draft program bears no relation to any enumerated power of Federal credit unions. There is ample support

in the record for such conclusions, as indicated above at pages 8-10.

3. The Petition For Certiorari Should Be Denied For The Additional Reason That Its Form Violates Rule 23 Of The Supreme Court Rules, To The Prejudice Of These Respondents.

The fact that the petitioners have chosen to file a single petition for certiorari designed to cover three cases instead of separate petitions for each of the three has imposed an unconscionable burden upon the respondents. Because the share draft case is joined in this fashion with the remote service unit and automatic transfer cases, these respondents are put to the choice of attempting to argue the lack of importance of questions in which we have no interest, or of ignoring those questions. The latter alternative risks the possibility that the Court may grant certiorari in all three cases in order to reach a question raised in one of the other cases, even though no question of sufficient independent importance appears in the share draft case.

The Supreme Court rules do not authorize such a procedure. A single petition for certiorari covering multiple cases may be filed only when the cases "involve identical or closely related questions." [16] But the petitioners themselves do not believe that the questions involved here are "identical or closely related." The petitioner Federal Home Loan Bank Board petitioned the court of appeals for a rehearing in its case arguing that it is *un*related to the share draft and automatic transfer cases.[17] Before this Court, the petitioners argue

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[16] Sup. Ct. R. 23(5).

[17] Petition for Rehearing and Suggestion that Rehearing Be En Banc, *Independent Bankers Association of America* v. *Federal Home Loan Bank Board* (D.C. Cir. No. 78-1849), p. 8.

for a decision based upon the "*separate* statutory provisions and legislative history involved in each case." [18]

In view of the petitioners' consistent position that the cases are separate and distinct, they should not now be heard to claim the contrary, that the cases are "identical or closely related." *Callanan Road Improvement Co.* v. *United States,* 345 U.S. 507, 513 (1953).

[18] Petition, p. 8. (Emphasis supplied.) *See also* Brief of Credit Union National Association and National Association of Federal Credit Unions, *Amici Curiae,* p. 11, which speaks of "the very different legal issues underlying the three cases, which each turn on the construction of quite different statutory provisions." Additionally, the Brief of San Diego Federal Savings & Loan Association as *Amicus Curiae,* p. 12, maintains that the three cases "involved totally different agencies, issues and statutory schemes," and that the questions presented in the share draft case and the automatic transfer case "have no meaningful legal relationship to the question presented in the Bank Board appeal."

CONCLUSION

The court of appeals held that issues of high financial public policy, such as the share draft issue, ought to be decided by the United States Congress, the body created by the Constitution for that purpose. The petitioners now claim that the court of appeals was wrong. For the reasons stated above, the respondents disagree with that claim, and respectfully urge the Supreme Court to deny the petition for a writ of certiorari.

Respectfully submitted,

WILLIAM H. SMITH
General Counsel
JOHANNA M. SABOL
Associate General Counsel
MICHAEL F. CROTTY
Assistant Counsel

September 21, 1979

APPENDIX.

APPENDIX A

NOT TO BE PUBLISHED—SEE LOCAL RULE 8(f)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

[Filed Apr. 20, 1979]

SEPTEMBER TERM, 1978

Civil Action No. 77-2102

No. 78-1337

AMERICAN BANKERS ASSOCIATION AND
TIOGA STATE BANK, APPELLANTS

v.

LAWRENCE B. CONNELL, JR., Administrator of the
National Credit Union Administration, ET AL.

Civil Action No. 76-0105

No. 78-1849

INDEPENDENT BANKERS ASSOCIATION OF AMERICA,
a corporation, APPELLANT

v.

FEDERAL HOME LOAN BANK BOARD, ET AL.

Civil Action No. 78-0878

No. 78-2206

UNITED STATES LEAGUE OF SAVINGS ASSOCIATIONS, an Illinois not-for-profit corporation, APPELLANT

v.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, an agency of the United States, ET AL.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BEFORE: McGOWAN, TAMM and WILKEY, Circuit Judges

JUDGMENT

These causes came on to be heard on their records on appeal from the United States District Court for the District of Columbia, and they were argued by counsel before this panel.

It appears to the court that the development of fund transfers as now utilized by each type of financial institution involved herein, commercial banks with "Automatic Fund Transfers," savings and loan associations with "Remote Service Units," and federal credit unions with "Share Drafts," in each instance represents the use of a device or technique

which was not and is not authorized by the relevant statutes, although permitted by regulations of the respective institutions' regulatory agencies. Specifically, the transfer from an interest-bearing time deposit (savings) account to a noninterest-bearing demand (checking) account by the Automatic Fund Transfer system, authorized by the Board of Governors of the Federal Reserve System in 43 Fed. Reg. 20,001 (1978) (to be codified in 12 C.F.R. § 217.5(c)(2) and (3)), is that "indirect[] . . . device" prohibited by 12 U.S.C. § 371a (1976);[1] the Remote Service Units utilized by many savings and loan associations, pursuant to Federal Home Loan Bank Board regulations (12 C.F.R. § 545.4-2 (1978)) which permit the withdrawal of funds from an interest-bearing time deposit account by a device functionally equivalent to a check, are in violation of the prohibition against checking accounts contained in Section 5(b)(1) of the Home Owners' Loan Act of

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[1] Similarly, the Automatic Fund Transfer system authorized by the Federal Deposit Insurance Corporation in 43 Fed. Reg. 20,222 (1978) (to be codified in 12 C.F.R. § 329.5 (c)(2)) is in violation of 12 U.S.C. § 1828(g) (1976), which directs the Board of Directors of the FDIC to prohibit the payment of interest on demand deposits. The court is of the view that the Automatic Fund Transfer system allows, in effect, for interest to be paid on demand deposits.

The Automatic Fund Transfer system also, in its effect, violates 12 U.S.C. § 1832(a) (as amended by Pub. L. No. 95-630, § 1301, 92 Stat. 3712, 10 Nov. 1978), which provides that, except in seven New England states, withdrawals from savings accounts may not be made by negotiable or transferable instruments for the purpose of making transfers to third parties.

1933 (12 U.S.C. § 1464(b)(1) (1976)); and the Share Drafts utilized by some federal credit unions, pursuant to National Credit Union Administration regulation (12 C.F.R. § 701.34 (1978)), are the practical equivalent of checks drawn on these interest-bearing time deposits in violation of the provisions of the Federal Credit Union Act, 12 U.S.C. §§ 1751-90 (1976).[2]

The history of the development of these modern transfer techniques reveals each type of financial institution securing the permission of its appropriate regulatory agency to install these devices in order to gain a competitive advantage, or at least competitive equality, with financial institutions of a different type in its services offered the public. The net result has been that three separate and distinct types of financial institutions created by Congressional enactment to serve different public needs have now become, or are rapidly becoming, three separate but homogeneous types of financial institutions offering virtually identical services to the public, all without the benefit of Congressional consideration and statutory enactment.

This court is convinced that the methods of transfer authorized by the agency regulations have outpaced the methods and technology of fund transfer

[2] The Act does not contain an express grant of power to offer share drafts, nor can that power be implied in view of the legislative history of laws regulating financial institutions (*see* Brief for Appellant in No. 78-1337, at 9-26), which demonstrates an intent on the part of Congress not to authorize federal credit union share draft programs.

authorized by the existing statutes. We are neither empowered to rewrite the language of statutes which may be antiquated in dealing with the most recent technological advances, nor are we empowered to make a policy judgment as to whether the utilization of these new methods of fund transfer is in the overall public interest. Therefore, we have no option but to set aside the regulations authorizing such fund transfers as being in violation of statute. We do so with the firm expectation that the Congress will speedily review the overall situation and make such policy judgment as in its wisdom it deems necessary by authorizing in whole or in part the methods of fund transfer involved in this case or any other methods it sees fit to legitimize, or conversely, by declining to alter the language of existing statutes, thus sustaining the meaning and policy expressed in those statutes as now construed by this court.

We recognize that enormous investments have been made by various financial institutions in the installation of new technology, that methods of financial operation in the nation have rapidly grown to rely on much of this, and that a disruption of the offered services would necessarily have a deleterious impact on the financial community as a whole, in the absence of the certainty that new procedures are authorized for the foreseeable future, which certainty only a Congressional enactment can give.

We recognize that there are arguments that Congress has, at some times and in some measure, tacitly approved part of these regulatory authorizations, but

by no means directly, explicitly, or in the whole. We further recognize that the wisdom of the transfer procedures permitted by the regulations of the several agencies is a matter of high public financial policy, involving the financial interests not only of the parties before this court in these proceedings, but also of other large groups in the nation. It is the responsibility of the Congress and not the courts to determine such policy.

On consideration of the foregoing, it is

ORDERED AND ADJUDGED by this court that the judgments of the district courts under review herein are reversed and the cases are remanded to the respective district courts with instructions to vacate and set aside the applicable portions of the following regulations:

(1) 43 Fed. Reg. 20,001 (1978) (to be codified in 12 C.F.R. § 217.5(c)(2) and (3)) of the Board of Governors of the Federal Reserve System;

(2) 43 Fed. Reg. 20,222 (1978) (to be codified in 12 C.F.R. § 329.5(c)(2)) of the Board of Directors of the Federal Deposit Insurance Corporation;

(3) 12 C.F.R. § 545.4-2 (1978) of the Federal Home Loan Bank Board; and

(4) 12 C.F.R. § 701.34 (1978) of the National Credit Union Administration; and it is

FURTHER ORDERED, by the Court, that the effectiveness of this Judgment, insofar as it directs that the subject regulations be vacated and set aside,

is stayed until 1 January 1980 in the expectation that the Congress will declare its will upon these matters; and it is

FURTHER ORDERED, by the Court, that the Clerk is directed to enter copies of this Judgment in each of the captioned cases.

Per Curiam

For the Court:

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Filed Mar. 7, 1978]

Civil Action 77-2102

AMERICAN BANKERS ASSOCIATION, ET AL.,
PLAINTIFFS

v.

LAWRENCE B. CONNELL, JR., ET AL., DEFENDANTS

MEMORANDUM

This is an action by the American Bankers Association and Tioga State Bank against the National Credit Union Administration ("NCUA") and its Administrator, challenging the statutory authority of Federal Credit Unions ("FCUs") to operate share draft programs under the Federal Credit Union Act (the "FCU Act"), 12 U.S.C. § 1751, *et seq.*[1] The

[1] On February 17, 1978, this Court denied motions to intervene filed by the Independent Bankers Association of America (seeking intervention as party-plaintiff), Credit Union National Association, National Association of Federal Credit Unions, and the Consumer Federation of America (seeking intervention as parties-defendant). However, the Court granted these organizations leave to participate as amici curiae. The terms "plaintiff" and "defendant" used herein shall include reference to the positions of the amici.

matter is before the Court on the parties' cross-motions for summary judgment. For the reasons discussed below, the Court finds that there are no genuine issues of material fact and that Defendants are entitled to judgment as a matter of law.

A share draft is a demand draft which is drawn by a member on his credit union share account and which is made payable to third parties. Each share draft is payable through a particular commercial bank. The function of the payable-through bank is to receive share drafts through bank clearing channels and present them to the credit union for payment. Share drafts are similar in appearance to checks and other drafts in that they provide spaces for a date, the name of the payee, the amount of the draft, and the member's signature as drawer. The member fills in the share draft, signs it, and delivers it to the payee in return for goods or services or for cash. Because the accounts on which share drafts are drawn are share accounts, such accounts earn dividends in the same fashion as regular credit union shares. However, no dividends are paid on those funds that are withdrawn from the account by share draft or otherwise before the end of the dividend period. Share draft accounts are subject to the right of FCUs to require sixty (60) days advance notice of withdrawal.

FCU share drafts originated in 1974 as an experimental pilot program approved by NCUA. By late 1977 some 514 FCUs in at least forty-five (45) states were participating in share draft programs. In Sep-

tember 1976, the American Bankers Association filed an action challenging the legality of the experimental share draft program. That litigation was dismissed without prejudice after NCUA agreed to undergo rule-making procedures and promulgate a formal rule governing share drafts. On December 8, 1977, NCUA published its final rule, which authorizes FCUs to continue establishing and implementing share draft programs.[2] Plaintiffs filed the instant lawsuit on December 9, 1977.

The issue before the Court is whether, consistent with the terms of the FCU Act and the general statutory scheme controlling federal financial institutions, the NCUA can authorize FCUs to utilize share drafts as a means of accessing members' accounts. A secondary issue in the case is whether the manner in which NCUA promulgated its regulation comports with the standards of the Administrative Procedure Act.

The Court begins with the proposition that a departmental construction of its own enabling legislation is entitled to great deference from the Courts. *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965). The interpretation given the statute by the agency charged with its administration is sustainable as long as that interpretation has a reasonable basis in law. Only where there are compelling indications that the interpretation is plainly erroneous should a Court invalidate an administrative construction of a statute. *Espinoza* v. *Farah Manufacturing Company*, 414 U.S. 86, 94-95 (1974); *Zuber* v. *Allen*, 396 U.S. 168, 192-193 (1969); *Board of Dir. & Officers, Forbes Federal Credit Union* v. *National Credit Union Administration*, 477 F.2d 77, 784 (10th Cir. 1973).

[2] See 12 C.F.R. § 701.34 at 42 Fed. Reg. 61977 (1977). The effective date of the rule was February 6, 1978, but implementation of the rule has been deferred pending resolution of the motions for summary judgment.

It is uncontested that FCUs possess the power to authorize and regulate withdrawals from share accounts. The source for this power is no where found in the express provisions of the FCU Act.[3] Rather, such power must be inferred from the language of 12 U.S.C. § 1757(15), which grants FCUs the authority to "exercise such incidental powers as shall be necessary or requisite to enable [FCUs] to carry on effectively the business for which [FCUs are] incorporated." An activity is authorized as an "incidental power" if it is convenient or useful in connection with the performance of one of the institution's established activities pursuant to its express powers. *Arnold Tours* v. *Camp*, 472 F.2d 427, 432 (1st Cir. 1972).

Defendants contend that the authority for FCUs to use share drafts procedures likewise can be inferred from the "incidental powers" clause of the

[3] While 12 U.S.C. § 1757(6) gives FCUs the express authority to receive the funds of their members for deposit into withdrawable share accounts, and makes those shares subject to the terms, rates and conditions established by the board of directors and the Administrator, the Act is completely silent as to how withdrawals may be requested or paid.

FCU Act.[4] Plaintiffs argue that share draft powers fail to qualify as incidental powers under the *Arnold Tours* standard. Plaintiffs liken share drafts to checks and demand deposits and claim that absent express statutory authorization FCUs lack the authority to permit members to access their accounts by means of share drafts.

Both sides focus too strongly on the mechanics of accessing accounts. What is important is not the method by which withdrawals are effected, but rather the type of account involved in this litigation: the traditional FCU share account.[5] There is no legal restriction on the amount or frequency of withdrawals from credit union share accounts. In the past, FCU members have had a variety of options available for withdrawing funds and making payments to third-parties out of their share accounts, including

[4] Defendants also argue that share drafts are expressly authorized under the FCU Act as part of the exercise of FCUs' powers to contract, 12 U.S.C. § 1757(1), or powers to receive and condition payments on shares, 12 U.S.C. § 1757 (6). However, the Court is not persuaded that either express provision, by itself, extends to the accessing of members' share accounts by means of share drafts.

[5] While share drafts differ from checks in certain respects, most notably in the 60 day notice provision which applies to share drafts, the distinction between share drafts and checks or demand deposits seems irrelevant to the Court. Share drafts may actually be equivalent to checks. In whatever manner share drafts are classified, however, the function of share drafts remains constant: share drafts are simply a method of accessing credit union share accounts. The validity or invalidity of share drafts must be measured, therefore, in terms of the relationship between share drafts and share accounts.

cash withdrawals, and withdrawals by travelers checks, by money order, or by credit union check. Further, it is not necessary that members make their withdrawals in person. Share drafts have been developed as a more convenient and efficient means by which FCUs can offer withdrawal and payment services, allowing FCUs to take advantage of advancements in computer technology.[6] Share drafts are simply a variation on established methods of accessing members accounts, similar to previous procedures for credit union third-party payments, and similarly valid as part of the exercise of FCUs incidental powers under the FCU Act.[7] To rule otherwise would be to raise form over substance, to deny the history of the use of drafts in commercial practice, and to unreasonably limit the undisputed power of FCUs to honor and regulate share account withdrawals.

Such a holding does not work violence with the statutory purposes for which FCUs were created. FCUs exist for the purposes of promoting thrift among members and creating a source of credit for provident or productive enterprises. 12 U.S.C. § 1752 (1). There has been no suggestion that the share draft program, as presently conducted on an experimental basis, has adversely affected the viability of

[6] The major advancement in the field has been the development of electronic funds transfer devices.

[7] See in the context of state-chartered credit unions, the Court's discussion in Iowa Credit Union League v. Iowa Department of Banking, Civil No. CE 6-3152 (D. Iowa May 24, 1977), appeal docketed, No. 2-60827, Supreme Court of Iowa, July 8, 1977.

FCUs or the interests of FCU members. The Court is satisfied that the use of share drafts will serve the basic purposes of FCUs.[8]

Further, the Court is persuaded that a finding that share draft practices are among the incidental powers of FCUs is not inconsistent with the legislative history of the FCU Act or the general Congressional scheme controlling federal financial institutions. Legislative history in this case has minimal utility. On the one hand, there is no indication from the Congressional debates on the FCU Act and other related legislation that Congress has intended to prohibit FCUs from utilizing share draft procedures. Throughout the course of development by FCUs of various methods of withdrawal from members' share accounts, there has been total silence from Congress concerning the propriety of any of these methods. Congress has been well aware of the on-going share draft program for several years now,[9] and yet in passing sweeping amendments to the FCU Act in 1977 failed to include any provision evidencing disagreement with the NCUA's position regarding share drafts. When Congress has intended to proscribe conduct on the part of financial institutions, Con-

[8] See the conclusions of the Administrator of NCUA, expressed at 42 Fed. Reg. 69178 (December 8, 1977).

[9] Between 1974 and 1976, share drafts were called to the attention of the Congress during testimony before the House and Senate oversight committees on federal financial institutions on numerous occasions. See the subcommittee hearings cited in Defendants' brief in support of Defendants' motion for summary judgment, pp. 24-25.

gress has done so with dispatch and specificity. See 12 U.S.C. §§ 1464(b) and 1832.[10] Thus it might be possible to find an implied ratification by Congress of NCUA's approval of FCU share drafts. See *Massachusetts Mutual Life Ins. Co.* v. *United States*, 288 U.S. 269, 283 (1933); *Alabama Association of Insurance Agents* v. *Board of Governors of the Federal Reserve System*, 533 F.2d 224 (5th Cir. 1976).

On the other hand, measures which would have authorized certain third-party payment powers on the part of FCUs have been introduced in the Congress, but have failed to pass.[11] In addition, there is language in the Congressional discussions on the FCU Act and related legislation that Congress has intentionally deferred consideration of the issue of FCU third-party payment powers.[12] This deferred consid-

[10] With respect to the NOW account legislation, 12 U.S.C. § 1832, it is interesting to note that FCUs were expressly excluded from the definition of "depository institutions" covered by the statute.

[11] See H.R. 8199 (1965) and 29 (1969), which would have given FCUs the authority to offer checking accounts for their members. See also H.R. 13077 (1976), which would have authorized FCUs to offer third-party payment accounts in states where state-chartered credit unions had that power. In addition, a provision in the proposed Credit Union Modernization Act of 1977 (123 Cong. Rec., p. H-166) would have amended 12 U.S.C. § 1757 to give FCUs the power to "sell, purchase or handle any money transfer instrument to or for members," but did not pass.

[12] See the remarks of Rep. J. William Stanton, Cong. Record, March 1, 1977, p. H-1525. See also the remarks of Senator Thomas McIntyre in the context of the NOW account legis-

eration is evident in the fact that there is presently pending before the Congress several pieces of proposed legislation which relate to FCU share draft powers.[13]

Congressional failure to specifically address the share draft issue and the spectre of future legislation on the subject do not mean that FCUs presently lack the authority to adopt share draft procedures. As noted earlier, share draft practices are valid as part of the exercise of the incidental powers of FCUs. If Congress eventually acts with regard to share drafts, Congress then will be making a policy judgment.[14] This Court cannot and will not indulge in such policy judgments. If accessing FCU members' accounts by means of share drafts is to be proscribed, it must be proscribed by the legislature.

The NCUA promulgated its final rule concerning share drafts, 12 C.F.R. § 701.34, after extensive rulemaking which included the solicitation of written and

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lation, Hearings, Senate Banking Committee, Subcommittee on Financial Institutions, 93d Cong., 1st Sess., March 30, 1973, p.3.

[13] See, for e.g., S. 2055, introduced on June 9, 1977, which would authorize the use of NOW Accounts by banks, savings and loans, and credit unions, and bring FCU share draft regulations into accord with regulations to be promulgated as to NOW Accounts.

[14] Both sides make much about the competitive position of FCUs vis-a-vis commercial banks. However, there is at present no policy concern with respect to competitive balance reflected in the FCU Act. This is what distinguishes the case at hand from Independent Bankers Association of America v. Smith 534 F.2d 921 (D.C. Cir. 1976).

oral views of numerous persons, organizations and banks, and which involved hearings in which plaintiffs and the various amici participated. The Court is not persuaded that the manner in which the rule was formulated is in any way violative of the provisions of the Administrative Procedure Act. In creating the NCUA, Congress directed the agency to be more responsive to the needs of credit unions and to provide more flexible and innovative regulation.[15] NCUA's actions with respect to share drafts are consistent with its mandate. The Court finds that NCUA's determination that share draft practices are in accord with the statutory purposes of FCUs and within the authority of FCUs under the provisions of the FCU Act has a rational basis and is not arbitrary or capricious or otherwise plainly erroneous.

For the above-stated reasons, the Court concludes that defendants are entitled to summary judgment herein.

/s/ Aubrey E. Robinson, Jr.
AUBREY E. ROBINSON, JR.
United States District Judge

March 7, 1978
(Date)

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[15] See S. Rep. No. 518, 91st Cong., 2d Sess., 3 (1970).

APPENDIX C

Statutes and Regulations

STATUTES:

1. 12 U.S.C. 371a provides in pertinent part:

   No member bank shall, directly or indirectly, by any device whatsoever, pay any interest on any deposit which is payable on demand * * *.

2. 12 U.S.C. 1828(g) provides in pertinent part:

   The Board of Directors [of the Federal Deposit Insurance Corporation] shall by regulation prohibit the payment of interest or dividends on demand deposits in insured nonmember banks and for such purpose it may define the term "demand deposit"; but such exceptions from this prohibition shall be made as are now or may hereafter be prescribed with respect to deposits payable on demand in member banks by section 19 of the Federal Reserve Act, as amended, or by regulation of the Board of Governors of the Federal Reserve System. The Board of Directors may from time to time, after consulting with the Board of Governors of the Federal Reserve System and the Federal Home Loan Bank Board, prescribe rules governing the payment and advertisement of interest or dividends on deposits, including limitations on the rates of interest or dividends that may be paid by insured nonmember banks (including insured mutual savings banks) on time and savings deposits. The Board of Directors may prescribe different rate limitations for different classes of deposits, for deposits of different amounts or with different maturities or subject to different conditions regarding with-

drawal or repayment, according to the nature or location of insured nonmember banks or their depositors, or according to such other reasonable bases as the Board of Directors may deem desirable in the public interest. The Board of Directors is authorized for the purposes of this subsection to define the terms "time deposits" and "savings deposits," to determine what shall be deemed a payment of interest, and to prescribe such regulations as it may deem necessary to effectuate the purpose of this subsection and to prevent evasions thereof. * * *

3. 12 U.S.C. 1832 provides in pertinent part:

   (a) Withdrawal by negotiable or transferable instruments; exceptions

   No depository institution shall allow the owner of a deposit or account on which interest or dividends are paid to make withdrawals by negotiable or transferable instruments for the purpose of making transfers to third parties, except that such withdrawals may be made in the States of Massachusetts, Connecticut, Rhode Island, Maine, Vermont, and New Hampshire.[2]

   (b) Definition

   For purposes of this section, the term "depository institution" means—

   (1) any insured bank as defined in section 1813 of this title;

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[2] The state of New York was added to the list of states excluded from the proscription of paragraph (a) of this Section by 92 Stat. 3641, 3712.

(2) any State bank as defined in section 1813 of this title;

(3) any mutual savings bank as defined in section 1813 of this title;

(4) any savings bank as defined in section 1813 of this title;

(5) any insured institution as defined in section 1724 of this title; and

(6) any building and loan association or savings and loan association organized and operated according to the laws of the State in which it is chartered or organized; and, for purposes of this paragraph, the term "State" means any State of the United States, the District of Columbia, any territory of the United States, Puerto Rico, Guam, American Samoa, or the Virgin Islands.

(c) Fine

Any depository institution which violates this section shall be fined $1,000 for each violation.

4. 12 U.S.C. 1757 provides in pertinent part:

A Federal credit union shall have succession in its corporate name during its existence and shall have power—

(1) to make contracts;

* * * * *

(15) to exercise such incidental powers as shall be be necessary or requisite to enable it to carry on effectively the business for which it is incorporated.

5. 12 U.S.C. 1766 provides in pertinent part:

(a) The Board may prescribe rules and regulations for the administration of this chapter (including, but not by way of limitation, the merger, consolidation, and dissolution of corporations organized under this chapter).

REGULATIONS:

1. 12 C.F.R. 701.34 (*see* 42 Fed. Reg. 61977, Dec. 8 1977) provides:

(a) For purposes of this section:

(1) "Share draft" means a negotiable or non-negotiable draft used to withdraw shares from a share draft account.

(2) "Payable through bank" means a bank that has been designated to make presentment of a share draft to the Federal credit union for payment.

(3) "Truncation" means the original share draft is not returned to the member.

(4) "Share draft account" means any regular share account from which the Federal credit union has agreed that shares may be withdrawn by means of a share draft or other order.

(5) "Liquidity reserve" means an allocation of current assets recorded on the credit union's records as cash or deposits and investments as authorized by Section 107 of the Federal Credit Union Act: *Provided,* That, any investments included as a portion of this reserve shall be redeemable within 60 days and have a maturity not in excess of 90 days.

(b) A Federal credit union may provide its members with share drafts. The board of directors shall determine, prior to requesting approval to implement the share draft program, that the members' use of share drafts is economically and operationally feasible for the Federal credit union.

(c) A Federal credit union must submit a written request to operate a share draft program to the Administration at least 60 days prior to the proposed date of implementation. The request shall include:

(1) An official copy of the minutes of the board of directors authorizing a request for approval to implement the share draft program.

(2) All background documentation which supports the board of directors' decision that the members' use of share drafts is economically and operationally feasible for the Federal credit union.

(3) A statement that the forms and procedures to be used have been reviewed by legal counsel.

(4) A statement that the board of directors has determined appropriate surety bond coverage is in force.

(5) A statement of operational specifications which expressly provide for:

(i) Identification of the payable through bank;

(ii) Truncation;

(iii) Establishing a share draft account agreement with each member which outlines the credit union's and member's responsibilities;

(iv) Recording of share overdrafts and giving members notification of such overdrafts should they occur;

(v) Encoding each share draft with the routing and transit number of the payable through bank, the share draft account number, and the serial number of the share draft in accordance with standards required for use in a clearing system utilizing Magnetic Ink Character Recognition devices;

(vi) Preprinting the name of the payable through bank and the name of the credit union on the share draft;

(vii) A method for each member using share drafts to maintain a record of share drafts drawn;

(viii) Submission of a periodic statement of account, no less frequently than quarterly, to each member who has a share draft account which shall include for each share draft processed the serial number, date of payment and the amount of payment;

(ix) Establishing responsibility for detection of unauthorized or forged drafts;

(x) Procedures for processing stop payment orders;

(xi) Procedures for providing members with copies of paid drafts should copies be requested;

(xii) Procedures for retaining paid drafts or copies of paid drafts on file for a period of five years or as required by state law, whichever is greater;

(xiii) The fees, if any, to be charged, provided such fees shall not exceed the direct and indirect costs of providing the service; and

(xiv) Procedures for establishing and maintaining an average daily liquidity reserve equal to 125 per cent of the aggregate amount paid on share drafts during the preceding month divided by the number of days on which share drafts were paid during that month.

(d) A Federal credit union may not commence operating a share draft program until it has received written approval from the Administration, which may limit member participation for a period not to exceed one year. Approval will not be given if:

(1) The requirements of paragraph (c) of this section have not been met;

(2) The supervisory committee has not fulfilled its statutory requirements as specified in the Federal Credit Union Act; or

(3) The management of the credit union has demonstrated through prior performance its inability to handle the additional activity the share draft program will generate.

(e)(1) The Federal credit union shall notify the Administration in writing, at least 60 days in advance of its proposed implementation date, of any modification relating to:

(i) The payable through bank;

(ii) Truncation procedures;

(iii) The share draft agreement;

(iv) Procedures for establishing and maintaining a liquidity reserve; and

(v) Any material modification not previously reviewed and approved by the Administration.

(2) Implementation of a modification is contingent upon written approval of the Administration.

(3) The Federal credit union shall immediately notify the Administration as to any matter affecting the information provided pursuant to paragraphs (c)(1) through (c)(4) of this section.

(f) If a share draft program or a request for modification is not approved, or the share draft program is approved for limited member participation, the Administration will provide to the requester a written notice setting forth the basis for such action.

(g) A Federal credit union shall not waive the right to require notice as set forth in the bylaws, but may guarantee payment of a share draft provided that:

(1) A specific guarantee authorization is obtained for the share draft from the Federal credit union; and

(2) The guarantee authorization is immediately noted on the share draft account to prevent the withdrawal of shares needed to pay the guaranteed share draft.

CERTIFICATE OF SERVICE

I hereby certify that I have this 21st day of September, 1979, mailed three copies of the accompanying Respondents' Brief in Opposition, by first class mail, postage prepaid, to each of the following:

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No. 79-278

In the Supreme Court of the United States

OCTOBER TERM, 1978

LAWRENCE CONNELL, CHAIRMAN OF THE NATIONAL CREDIT UNION ADMINISTRATION BOARD, ET AL., *Petitioners*

v.

AMERICAN BANKERS ASSOCIATION, ET AL.

FEDERAL HOME LOAN BANK BOARD, ET AL., *Petitioners*

v.

INDEPENDENT BANKERS ASSOCIATION OF AMERICA

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, ET AL., *Petitioners*

v.

UNITED STATES LEAGUE OF SAVINGS ASSOCIATIONS

In Support of Petition For a Writ of Certiorari To the United States Court of Appeals For The District of Columbia Circuit

BRIEF OF CREDIT UNION NATIONAL ASSOCIATION, INC. AND NATIONAL ASSOCIATION OF FEDERAL CREDIT UNIONS, INC., AMICI CURIAE

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INDEX

CITATIONS

CASES:

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In Support of Petition For a Writ of Certiorari To the United States Court of Appeals For The District of Columbia Circuit

---

BRIEF OF CREDIT UNION NATIONAL ASSOCIATION, INC. AND NATIONAL ASSOCIATION OF FEDERAL CREDIT UNIONS, INC., AMICI CURIAE

Credit Union National Association, Inc. and the National Association of Federal Credit Unions, as *amici curiae,* submit this Brief in support of the Petition for Certiorari of the Solicitor General on behalf of the National Credit Union Administration and its

Chairman Lawrence Connell for review of the judgment of the U.S. Court of Appeals in *Connell* v. *American Bankers Assoc.*

INTEREST OF THE AMICI

Credit Union National Association, Inc. (CUNA) and the National Association of Federal Credit Unions, Inc. (NAFCU) are credit union associations whose members and affiliates include nearly all federal credit unions operating share draft programs that are the subject of this case.

CUNA represents the interests of 8,202 state and 11,841 federal credit unions that are affiliated with CUNA through membership in 51 state and area credit union leagues. The membership of NAFCU consists of 401 federal credit unions, whose assets account for more than one-third of the total assets of all federal credit unions.

CUNA and NAFCU jointly participated in this matter as *amici curiae* in the District Court and before the Court of Appeals. Pursuant to Rule 42(1) of this Court, CUNA and NAFCU have received consent to file this Brief from all of the parties to this case and the two companion cases, *Federal Home Loan Bank Board* v. *Independent Bankers* and *Board of Governors* v. *U.S. League of Savings Assoc.*

ARGUMENT

a. Introductory Statement

On April 20, 1979, the U.S. Court of Appeals for the District of Columbia entered its judgment in *American Bankers Assoc.* v. *Connell* and, reversing the District Court, held that the petitioner National Credit Union Administration (NCUA) had violated the statutes it administers by issuing regulations for the withdrawal of accounts in federal credit unions by means of negotiable or transferable share drafts. (12 C.F.R. 701.34.). In the same decision, the Court of Appeals decided two companion cases and held that bank automatic transfer services and federal savings and loan remote service units had also been established in violation of federal law.

If the decision of the Circuit Court is allowed to take effect on January 1, 1980, as now ordered, the impact on the nation's credit unions and their members will be enormous. Directly affected will be the more than one million Americans already relying on share drafts to conduct their daily financial affairs. Additionally affected will be the millions more who belong to federal credit unions that will be unable to commence share draft programs if the decision of the Court becomes final.

Of even broader concern than the issue of share drafts themselves, the Court of Appeals' decision has thrown into complete uncertainty the whole meaning of the incidental powers authority granted federal credit unions by Congress. By overruling the determination of NCUA that share draft withdrawals are incidental to the business of credit unions, while providing no guidance as to what activities would be so allowed, the Court has left credit unions and their regulator in an impossible situation where the legality of other credit union functions may now be subject to question.

In view of the tremendous impact the Court's ruling has had on an entire industry and the statutory system devised by Congress to regulate it, CUNA and NAFCU respectfully urge that the Petition of the Solicitor General be granted.

While legislation currently pending in Congress would reverse the Court of Appeals decision and could render this litigation moot, the enactment of these proposals is hardly assured. For the reasons stated below, it is believed that the Court of Appeals seriously erred in construing existing law. That error should be rectified to prevent serious harm to the nation's financial institutions and the public they serve.

b. Historical Background

Federal credit unions are nonprofit, cooperative associations incorporated under the Federal Credit Union Act, 12 U.S.C. Secs. 1751, *et seq.* They are supervised and regulated by the Petitioner NCUA, an independent agency within the executive branch, which also insures credit union accounts through a deposit insurance fund established by 12 U.S.C. Sec. 1783.

Like banks and other depository institutions, federal credit unions are primarily engaged in the business of receiving deposits of money and making loans. Unlike other depository institutions, however, a credit union may not deal with the general public, but instead is restricted to providing services only for its own members, who must share a common bond of employment, association or residency. *See,* 12 U.S.C. Sec. 1759. As a true cooperative, a credit union is organized on a democratic basis, with each member having one vote in electing a board of directors and a credit committee,

which direct the credit union's business. 12 U.S.C. Secs. 1760, 1761b, 1761c. In essence, federal credit unions were created as nonprofit alternatives to commercial banks so that individuals could join together to obtain financial services on a cooperative basis. Their basic purpose is to receive the funds of their members on deposit and thereby serve their members as a source of inexpensive credit.

By tradition, credit union deposits are referred to as "shares," although they bear little resemblance to shares of stock in an ordinary corporation. Instead, a member's shares, like a deposit, may be withdrawn in cash at any time and may be paid either to the member directly or to any third party the member may specify. Pursuant to 12 U.S.C. Sec. 1763, funds in share accounts may receive interest (referred to as "dividends") at rates declared periodically by the board of directors.

While shares may be withdrawn whenever a member may request, the Federal Credit Union Act is completely silent as to the mechanics by which withdrawals may be made. No procedures are prescribed by statute, and none is prohibited. Instead, Congress has explicitly empowered each credit union to determine for itself the manner in which its share accounts are to be handled, subject only to regulation by the NCUA. *See,* 12 U.S.C. Sec. 1757(6).[1]

---

[1] With respect to deposit withdrawals, Congress has put federal credit unions in the same legal posture as national banks, which also have statutory power to *receive* deposits (12 U.S.C. Sec. 24 Seventh) but which lack express authority to provide for any particular method of deposit withdrawal. Indeed, the original National Bank Act of 1864 did not mention withdrawals by check or even use the terms "check" or "checking account." Act of

Given that broad grant of power, and in the absence of any statutory restrictions, federal credit unions have traditionally employed a wide variety of procedures for the handling of withdrawals, including withdrawals for payment directly to third parties. Hence, a member can direct, in person, in writing or by telephone, that a withdrawal be sent directly to a creditor in payment of the member's obligations. Withdrawals can be obtained in the form of money orders or travelers cheques for payments to third parties. Members can preauthorize their credit union to pay recurring bills on their behalf directly out of their accounts. For a number of years, many credit unions have furnished their members with "loan draft" forms which can be filled in by members and drawn on their credit unions to obtain payment of loan advances directly to third party payees to whom the drafts have been negotiated.

The legality of these various procedures is not disputed. It is also undisputed that because of their availability, credit union accounts have been traditionally used, not only for long-term savings, but also for day-to-day transactions and third-party payments.

By the early 1970's, developments in financial technologies had made it possible for credit unions to consider new procedures for handling their traditional

June 3, 1864, ch. 106, 13 Stat. 99. While various references to checks and checking have entered the national bank laws over the intervening years, these provisions merely regulate but do not explicitly authorize bank checking. *C.f.*, 12 U.S.C. Secs. 36(f), 92a(d). The national banking statutes make no reference at all to a number of other procedures which bank depositors may employ to withdraw their funds.

business of providing third-party payment services to those members that desired them. For the first time, credit unions in significant numbers were acquiring access to low-cost electronic data processing, so that more automated methods for share withdrawal could be handled economically. At the same time, increasing competition for short-term consumer dollars made it necessary for credit unions to become even more responsive to those members who wanted to use their shares for current transactions.

In response to these factors, the first share draft programs were put into operation in the fall of 1974.

NCUA had given the program its prior regulatory approval, concluding that credits unions could honor share withdrawal drafts as an exercise of their statutory incidental powers under 12 U.S.C. Sec. 1757(15).[2] At common law, and under the Uniform Commercial Code, a draft is nothing more than a written order by which one person (the drawer) directs another person from whom money is owed (the drawee) to discharge its obligation by paying funds to a third party (the payee) whom the drawee has specified. Uniform Com-

[2] Section 1757(15) provides that a federal credit union shall have the power "to exercise such incidental powers as shall be necessary or requisite to enable it to carry on effectively the business for which it is incorporated." Under established principles developed in cases construing the very similar grant of incidental powers to national banks, this language has the effect of authorizing federal credit unions to conduct any activity that is "convenient or useful" in connection with the performance of their established, statutory activities. *Arnold Tours* v. *Camp*, 472 F.2d 427, 432 (1st Cir., 1972); *M & M Leasing Corp.* v. *Seattle First Nat. Bank*, 563 F.2d 1377 (9th Cir., 1977), *cert. denied*, 98 S.Ct. 3069 (1978).

mercial Code, Sec. 3-104.[3] Since anyone can draw a draft by simply framing a written direction for the payment of money according to the form prescribed by law, NCUA concluded that there was no legal impediment to a member requesting a share withdrawal by drawing a draft against his or her credit union. At the same time, NCUA determined that in the absence of any prohibition there was no legal reason to prevent a credit union from paying a withdrawal request in the form of a draft, just as credit unions have always been permitted to honor other written orders and authorizations directing payment of withdrawals to third parties.

From an operational standpoint, a share draft takes the form of a sight draft drawn by the member on the credit union and "payable through" a commercial bank named on the instrument. That draft can be filled in by the member and negotiated to a merchant or other payee for cash or to obtain goods or services. The payee deposits the draft with a bank or other financial institution which, in turn, can send the draft through the banking system to the "payable through" bank for presentment to the credit union.

The development of share draft programs depended upon the availability of low-cost credit union data processing so that the clearing and payment of share drafts could be handled on an automated, cost-effective basis. Through a process referred to as "truncation," share drafts received by the payable-through bank are con-

[3] Citation is to the Uniform Commercial Code (1972 Official Text). Articles 3 and 4 of the U.C.C. deal with drafts, checks and other commercial paper and have been enacted in substantially identical form in all fifty states and the District of Columbia.

verted to an electronic medium and transmitted by computer to the processing center that handles the credit union's accounting. Upon presentment of the draft through this electronic procedure, funds are withdrawn from the member's share account (if the balance is sufficient), and the instrument is paid by the credit union.

Operational aspects of the initial share draft programs were originally approved on a pilot basis by NCUA pursuant to 12 C.F.R. Sec. 721.3, a regulation adopted by the agency to provide for experimental programs relating to electronic funds transfer and similar operational systems. On December 8, 1977, NCUA published a final rule, 12 C.F.R. Sec. 701.34, regulating the operation of share draft programs on a permanent basis. The validity of this rule was upheld by the District Court in *American Bankers Assoc.* v. *Connell,* 447 F.Supp. 296 (1978), reversed by the Court of Appeals below.

As of June 30, 1979, 878 federal credit unions had established operating share draft programs and had opened 997,992 individual and joint share accounts from which share draft withdrawals could be made. During the quarter ending that month, those credit unions paid 35 million, one hundred nine thousand three hundred fifty two drafts with an aggregate value of $2 billion, four hundred twenty six million, seven hundred ninety two thousand, three hundred three dollars.

The development of share drafts from a pilot program to a major financial service did not occur without Congressional knowledge and supervision. Between October, 1974, when the program began, and the end

of 1976, the House and Senate oversight committees on federal credit unions specifically reviewed the share draft program on numerous occasions. *See,* e.g., *Financial Institutions Act of 1975; Hearings Before the Subcomm. on Financial Institutions of the Senate Comm. on Banking, Housing and Urban Affairs,* 94th Cong., 1st Sess., at 13, 583, 602-608, 687-689 (1975); *Regulation Q: Hearings Before the Subcomm. on Financial Institutions of the House Comm. on Banking, Currency, and Housing,* 94th Cong., 1st Sess., at 2256, 2291 (1975); *Financial Institutions and the Nation's Economy: Hearings Before the Subcomm. on Financial Institutions of the House Comm. on Banking, Currency, and Housing,* 94th Cong., 1st and 2nd Sess., pt. 2, at 1182 (1975); *Financial Reform Act of 1976: Hearings Before the Subcomm. on Financial Institutions of the House Comm. on Banking, Currency and Housing,* 94th Cong., 2nd Sess., at 80-81 (1976). As early as May 16, 1975, NCUA's Administrator specifically advised Congress that he had concluded that no new legislation was necessary to permit the program to be established on a permanent basis. *Financial Institutions Act of 1975: Hearings Before the Subcomm. on Financial Institutions of the Senate Comm. on Banking, Housing and Urban Affairs,* 94th Cong., 1st Sess., at 608.

With this background, and in April, 1977, when nearly a quarter million consumers were already using share drafts, Congress enacted P.L. 95-22 which included the most comprehensive amendments to the Federal Credit Union Act since its original passage in 1934. Far from indicating any disapproval of the agency's action in establishing the share draft program, P.L. 95-22 specifically confirmed that the terms and

conditions governing share accounts are to be determined by each credit union's board of directors, subject to NCUA regulation. Amending 12 U.S.C. Sec. 1757 (6), which confers the power to receive withdrawable shares, P.L. 95-22 added language to provide that a federal credit union may receive payments on shares "subject to such terms, rates, and conditions as may be established by the board of directors, within limitations prescribed by the [NCUA] Administrator."

c. Reasons for Granting the Writ

Fundamentally, the Court of Appeals erred in its apparent assumption that it was constrained to decide this and the two companion cases so as to achieve the same result in all three. In so doing, the court failed to adequately confront the very different legal issues underlying the three cases, which each turn on the construction of quite different statutory provisions. Instead, the court was led to erroneous conclusions by its philosophical belief that Congress should reexamine the respective roles of credit unions, banks and other financial institutions and readdress matters already entrusted to the financial regulators by law.

The unfortunate irony in the court's approach was that, while professing to preserve Congressional authority, the court seriously undermined the comprehensive legal and administrative structure devised by Congress to regulate financial institutions. In adopting laws providing for credit unions, banks and savings and loan associations, Congress wisely refrained from enacting detailed specifications for their day-to-day operations. Instead, basic powers were granted in general terms, and a large measure of discretion to con-

form those powers to changing circumstances was delegated to the agencies who are petitioners herein.

That Congressional approach to financial institutions is particularly apparent in the statutory treatment of credit union accounts. Federal credit unions have been given a general authority to receive deposits, but the manner of withdrawal is nowhere specified by statute. Instead, the law explicitly provides that the terms and conditions for handling these accounts are to be determined by each credit union's board, subject only to NCUA regulation.[4]

The absence of any Congressional limitations on credit union withdrawals fundamentally distinguishes this case from the other two involved in the instant petition. In the case of bank automatic transfer services and S & L remote terminals, the court could at least point to particular statutes that arguably prohibit the activities in question. *See,* 12 U.S.C. Secs. 371a, 1828(g), 1832(a), 1464(b)(1). With respect to federal credit unions, on the other hand, no such prohibition exists.

It should not be inferred that CUNA and NAFCU agree that the other two cases were decided correctly.

[4] In this connection, it is important to note that Congress created NCUA as an independent agency in 1970 with the specific intent that it provide more flexible and innovative regulation for federal credit unions. The Senate Banking Committee report on the bill creating NCUA stated the agency's mission as follows:

> "The committee believes that it is necessary to provide for the establishment of an independent agency to supervise and regulate the activities of the Federal credit unions. The committee believes that such an agency would be able to be more responsive to the needs of credit unions and to provide more *flexible and innovative regulation.*" S. Rep. No. 91-158, 91st Cong., 1st Sess. 3 (1970). (Emphasis added.)

To the contrary, we believe the Court of Appeals erred in deciding those cases as it did. The point is, however, that when Congress has intended to prohibit particular withdrawals from the accounts of other institutions, it has clearly expressed that intention with specific legislation. Thus, whatever effect 12 U.S.C. Sec. 1464(b)(1) may have on S & L electronic terminals, it is abundantly clear that savings and loan accounts cannot be withdrawn by check. Similarly, 12 U.S.C. Sec. 1832(b) unquestionably prohibits banks, S & L's and mutual savings banks from permitting withdrawals by negotiable or transferable instruments directly from interest-bearing accounts. Credit unions are not included in either of these prohibitions.

The Court of Appeals held that express statutory authority is necessary in order for an institution to permit withdrawals by negotiable draft. Congress apparently felt otherwise or it would have seen no reason to enact the prohibitions referred to above. Indeed, the great weight of judicial authority supports the proposition that no specific grant of authority is required to permit credit unions, savings and loans and other non-bank, financial institutions to provide for withdrawals by negotiable draft where the laws contain no prohibition. *Florida Bankers Assoc.* v. *Leon County Teachers Credit Union,* 359 So.2d 886 (Fla. 1st D.Ct. App. 1978). *cert. denied* and *appeal dismissed,* 368 So.2d 1366 (Fla. S.Ct. 1979) (credit union share drafts); *Wisconsin Bankers Assoc.* v. *Mutual Savings & Loan Assoc.,* 87 Wis.2d 470, 275 N.W.2d 130 (Wis. Ct.App., 1978) (S&L withdrawal drafts); *Washington Bankers Assoc.* v. *Washington Mutual Savings Bank,* —— Wash.2d ——, —— P.2d —— (Case No. 45875, August 2, 1979) (savings bank withdrawal drafts);

Consumers Savings Bank v. *Commissioner of Banks,* 361 Mass. 717, 282 N.E.2d 416 (Mass. 1972) (savings bank NOW drafts); *Savings Bank of Baltimore* v. *Bank Commissioner,* 248 Md. 461, 237 A.2d 45 (1968) (savings bank checking accounts); *Pennsylvania Bankers Assoc.* v. *Secretary of Banking,* 392 A.2d 1319 (Pa. S.Ct. 1978) (savings bank withdrawal drafts); *State* v. *Crookston Trust Co.,* 203 Minn. 512, 282 N.W. 138 (1938) (trust company checking); *State* v. *Lincoln Trust Co.,* 144 Mo. 562, 46 S.W. 593 (1898) (trust company checking).[5]

Accordingly, the Court of Appeals' conclusion that share drafts are "the practical equivalent of checks" does not dispose of the inquiry, as the court apparently believed. No statute reserves to banks any exclusive

[5] Only three reported cases, all of them distinguishable, have reached a contrary conclusion. In *New York State Bankers Assoc.* v. *Albright,* 38 N.Y.2d 430, 343 N.E.2d 735, 381 N.Y.S.2d 17 (1975) the court held that an amendment which simply removed a requirement that savings bank depositors present a passbook upon each withdrawal did not authorize withdrawals by negotiable draft where the law had been consistently interpreted to preclude draft withdrawals prior to the amendment. Similarly, in *Androscoggin County Savings Bank* v. *Cambell,* 282 A.2d 858 (Maine 1971), the court relied on a 1917 opinion of the state attorney general, consistently followed ever since, concluding that savings banks in that state could not offer checking accounts. As in the New York case, there was no indication that Maine savings banks had ever provided any third-party payment services whatever. Indeed, the Maine Supreme Court found as a fact that savings bank accounts had been traditionally reserved for long-term savings only. *Iowa Credit Union League* v. *Iowa Department of Banking,* 268 N.W.2d 165 (Iowa, 1978), holding against draft withdrawals from Iowa state-chartered credit unions, is distinguishable on the same basis. Iowa statutes expressly limit a state-chartered credit union to receiving the "*savings* of its members." No such limitation is to be found in the Federal Credit Union Act.

monopoly on the withdrawal of funds by check-like instruments. No statute expressly or by inference prohibits such withdrawals from credit unions.

CONCLUSION

For the foregoing reasons, we respectfully suggest that the Court of Appeals erred seriously in deciding that the use of credit union share drafts violates federal law. Moreover, the impact of its decision in this and the two companion cases will have a substantial and damaging impact on the nation's financial institutions and the millions of consumers who are using the services in question.

Because the Court of Appeals decided the three cases for the whole country, no conflict among the circuits will arise. Given the great importance of these cases, therefore, we respectfully urge this Honorable Court to grant the Petition.

Respectfully submitted,

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September 1979

Certificate of Service

I HEREBY CERTIFY that three copies of this document were mailed, postage prepaid, in accordance with the provisions of Rules 33.1 and 33.2(a) of the Rules of the United States Supreme Court, to each of the individuals listed below this 7th day of September, 1979.

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No. 79-278

IN THE

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LAWRENCE CONNELL, CHAIRMAN OF THE NATIONAL CREDIT UNION ADMINISTRATIVE BOARD, ET AL.,
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v.

UNITED STATES LEAGUE OF SAVINGS ASSOCIATIONS

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND BRIEF OF SAN DIEGO FEDERAL SAVINGS AND LOAN ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITION OF THE FEDERAL HOME LOAN BANK BOARD FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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v.

UNITED STATES LEAGUE OF SAVINGS ASSOCIATIONS

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

TO THE HONORABLE CHIEF JUSTICE AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

San Diego Federal Savings and Loan Association ("San Diego Federal") hereby moves, pursuant to Rule 42 of the Rules of the United States Supreme Court, for leave to file the attached "BRIEF OF SAN DIEGO FEDERAL SAVINGS AND LOAN ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITION OF THE FEDERAL HOME LOAN

BANK BOARD FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT", and as grounds therefor alleges as follows:

I

San Diego Federal Savings and Loan Association is a federally chartered savings and loan association with sixty-seven offices located in San Diego County and various other areas of California. It operates under the authority, and pursuant to regulations, of a federal agency, the Federal Home Loan Bank Board ("the Bank Board").

II

In 1974 the Bank Board promulgated a regulation, 12 C.F.R. §545.4-2, authorizing federally chartered savings and loan associations to establish "remote service units" ("the RSU regulation"). Under the definition contained in the RSU regulation, a "remote service unit" would include "an information processing device . . . by which information relating to financial services rendered to the public is stored and transmitted" to the association, which is "not [located] on the premises of any [manned] facility of a Federal association", and which is activated by a machine readable instrument and "word, number, or other security identifier essential for user access of an account".

III

Pursuant to the authority of the RSU regulation, and as part of an automatic teller service program which San Diego Federal conducts under the trade name "24-Hour Teller", San Diego Federal has established three "remote service units" in

San Diego County; and, based upon the success which these units have enjoyed and their popularity with customers, it plans to establish others. It has, in its advertising over a period of three to four years, promoted the availability of the "24-Hour Teller" program, including the remote service units, as a reason for customers to do business with San Diego Federal; and many customers have in fact come to utilize and rely upon San Diego Federal's remote service units and other automatic teller machines.

IV

In its judgment in *Independent Bankers Association of America v. Federal Home Loan Bank Board,* D.C.Cir. No. 78-1849 ("the Bank Board appeal"), one of the three decisions which is the subject of the within proceeding, the United States Court of Appeals for the District of Columbia Circuit has determined that the Bank Board exceeded its statutory authority in promulgating, and has directed the United States District Court to "vacate and set aside", the RSU regulation. Should that judgment be implemented and the RSU regulation vacated, San Diego Federal and other federally chartered associations that have established remote service units would be forced to abandon such units.

V

San Diego Federal is familiar with the questions involved in the Bank Board Appeal and with the presentation of the Bank Board in its "PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT" ("the petition for writ of certiorari") herein. In its *amicus curiae* brief in support of the petition for certiorari, San Diego Federal will

argue the following points, which are either not addressed at all or not adequately addressed in the petition for writ of certiorari:

1. Implementation of the judgment of the Court of Appeals in the Bank Board appeal nullifying the RSU regulation would a) be inimical to the interests of low income and minority depositors and other consumers who rely upon the remote service units as a medium for transacting business with their respective savings and loan associations; (b) contravene the public policy in favor of energy conservation; and (c) injure federally chartered savings and loan associations such as San Diego Federal which have established remote service units in reliance upon authority given them by the governmental agency charged by law with responsibility for regulating their operation.

2. The judgment of the Court of Appeals in the Bank Board appeal is clearly erroneous: 1) the assertion of the Court of Appeals to the contrary notwithstanding, a "passcard" or other device used to effect the withdrawal of funds through a remote service unit is manifestly not the "functional equivalent" of a check, 2) federal law explicitly provides that the Bank Board "may by regulation provide for withdrawal or transfer of savings accounts upon non-transferable order or authorization"; 3) the withdrawals and transfers which may be effected through remote service units are identical to those which may be effected at manned association facilities; 4) federal law explicitly mandates the Bank Board to encourage federal associations to establish remote service units; and 5) remote service units advance the basic purposes of federal savings and loan associations.

VI

San Diego Federal believes that its argument on the above referenced points will assist the Court in determining whether or not to grant the petition for writ of certiorari.

VII

San Diego Federal has asked all parties to the appeals which are the subject of the petition for writ of certiorari for their consent to its filing an *amicus curiae* brief; and all parties have given such consent except one, the Independent Bankers Association of America.

Wherefore, San Diego Federal requests permission to file the attached *amicus curiae* brief.

Respectfully submitted,

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

No. 79-278

IN THE

Supreme Court of the United States

October Term 1978

LAWRENCE CONNELL, CHAIRMAN OF THE NATIONAL CREDIT UNION ADMINISTRATIVE BOARD, ET AL.,
Petitioners

v.

AMERICAN BANKERS ASSOCIATION, ET AL.

FEDERAL HOME LOAN BANK BOARD, ET AL.,
Petitioners

v.

INDEPENDENT BANKERS ASSOCIATION OF AMERICA

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, ET AL.,
Petitioners

v.

UNITED STATES LEAGUE OF SAVINGS ASSOCIATIONS

BRIEF OF SAN DIEGO FEDERAL SAVINGS AND LOAN ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITION OF THE FEDERAL HOME LOAN BANK BOARD FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

I

QUESTIONS PRESENTED

The basic question presented in the appeal to which this brief is addressed, *Independent Bankers Association of America v. Federal Home Loan Bank Board,* D.C. Cir. No. 78-1849

("the Bank Board appeal"), is whether the Federal Home Loan Bank Board ("the Bank Board") exceeded its statutory authority in promulgating a regulation, 12 C.F.R. §545.4-2 ("the RSU regulation"), authorizing federal savings and loan associations to establish off-premises computer terminals which enable account holders to obtain some of the same services that the associations may lawfully render in their manned facilities and, in particular:

> 1. Whether the RSU regulation is within the plenary delegation to the Bank Board under §5(a) of the Home Owners' Loan Act of 1933 ("HOLA"), 12 U.S.C. §1464(a), of authority to regulate the operation of federally chartered savings and loan associations; and
>
> 2. Whether the RSU regulation violates the prohibition in §5(b)(1) of HOLA, 12 U.S.C. §1464(b)(1), that "[s]avings accounts shall not be subject to check or to withdrawal or transfer on negotiable order or transferable order or authorization", even though §5(b)(1) expressly provides that the Bank Board "may by regulation provide for withdrawal or transfer of savings accounts upon nontransferable order or authorization" and even though the withdrawals and transfers which may be effected through such off-premises computer terminals are identical to those which may be lawfully effected at manned association facilities.

II

INTEREST OF AMICUS CURIAE

San Diego Federal Savings and Loan Association ("San Diego Federal") is a federal savings and loan association

chartered by, and operating pursuant to regulations of, the Bank Board.[1]

San Diego Federal conducts, and since 1975 has conducted, a program to enable customers — and *only* customers — to transact business with the association through the medium of information processing devices which constitute, in effect, automatic teller machines.

The program, which operates under the trade name "24-Hour Teller" and is similar to programs offered by other financial institutions, functions essentially as follows: 1) a customer establishes, at a manned facility of San Diego Federal, a "passcard" account, which is merely a type of a passbook account and which, like all passbook accounts at federal associations, is subject to the right of the association to require thirty days' notice as a condition precedent to withdrawal; 2) the customer is issued a "passcard"; 3) when the customer wishes to conduct a transaction with respect to the account, he or she either presents the "passcard" to a human teller at a manned facility or inserts the "passcard" in the appropriate slot in a machine teller; and 4) the human teller or the machine teller then performs the requested transaction.

There is a broad range of transactions which may be performed with respect to passbook and "passcard" accounts. The machine tellers, however, may perform only four types of transactions, *each of which is within the universe of transactions that may lawfully be performed by a human teller:* (a) the deposit of checks or cash into the account; (b) the withdrawal

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[1] At present, San Diego Federal has a total of sixty-seven manned facilities, or offices, located in San Diego County and elsewhere in California. It holds savings accounts aggregating approximately one-and-one-half billion dollars and a portfolio of more than sixty thousand mortgage and home improvement loans.

of cash or travelers checks in $20 denominations from the account; (c) the making of payments to San Diego Federal; and (d) the making of an "account status inquiry".[2]

The "24-Hour Teller" program, which now includes a total of 21 automatic teller machines, has been well received by consumers. In July, 1978, for example, San Diego Federal had a total of 60,799 "passcard" accounts, and a total of 34,328 transactions were performed on San Diego Federal's network of automatic teller machines. By July of 1979, however, the number of "passcard" accounts had risen to 79,034, and the number of transactions performed in San Diego Federal's network of automatic teller machines for the month had risen to 66,812.

While the "24-Hour Teller" program is utilized by people in virtually every walk of life and personal situation, there are clear indications that such utilization is particularly widespread and intensive in the case of racial minorities, non-English-speaking persons, families in which all adult members are employed during normal business hours, one-car families, families in which one spouse is handicapped, students, and low income families generally. Such indications include 1) the fact that while the average balance in all of San Diego Federal's deposit accounts as of July, 1979, was almost six thousand dollars, the average balance in the "passcard" accounts was less than $2,000;[3] the fact that a large percentage of the transactions conducted through automatic teller machines take place before

[2] The "account status inquiry" permits the account holder to ascertain (1) the balance in the account; (2) the interest credited to the account during the current calendar year; (3) the interest credited to the account during the preceding calendar year; and (4) the date and amount of the last transaction.

[3] Indeed, while the ***number*** of "passcard" accounts was growing, the average ***balance*** in the "passcard" accounts actually declined from $2,083 in July, 1978 to only $1,752 in July, 1979, suggesting that the new customers attracted to the "24-Hour Teller" program are low-income savers.

or after normal business hours (when San Diego Federal's manned facilities are closed); and 3) the fact that usage of the automatic teller machine is particularly heavy in areas occupied by Blacks and Spanish-speaking persons, the machines in Spanish-speaking areas being programmed to operate bilingually in both Spanish and English.[4]

The network of 21 automatic teller machines in San Diego Federal's "24-Hour Teller" program may, for present purposes, be divided into two categories: 1) those located *on* the premises of manned facilities of the association, and 2) those located *off* the premises of manned facilities, so-called "remote service units", established pursuant to the RSU regulation of the Bank Board. The transactions which may be conducted through the medium of the two categories of machines are identical.

At present, three of the automatic teller machines in San Diego Federal's "24-Hour Teller" program are remote service units, and it plans to establish more.[5] Its experience with such units has been extremely favorable:

[4] San Diego Federal is presently converting all of its automatic teller machines to so operate, thereby affording Spanish-speaking customers access to their accounts over a broad geographic area.

[5] The three presently functioning remote service units are located at the San Diego State University in the student mall, at Parkway Plaza Shopping Center in El Cajon, and at the San Diego Airport. (San Diego Federal has also located numerous manned branches in shopping centers and near university campuses.) Each remote service unit is placed in a small, free-standing kiosk, occupying approximately 144 square feet of land, constructed by, and located on ground leased by, San Diego Federal.

A remote service unit can be located on the premises of a mercantile establishment and require the participation of the merchant in order to consummate a transaction. (See "Brief for Defendant-Appellee Federal Home Loan and Board" in the United States Court of Appeals, p. 7.) None of the remote service units operated by San Diego Federal, however, are of that type: they are neither located within mercantile establishments nor do they require the participation of a merchant (or any third party) to consummate a transaction.

1. Deposits have consistently exceeded withdrawals. During July, 1979, for example, deposits in the remote service units operated by San Diego Federal were $544,000 while withdrawals were only $235,000. Thus, the overall deposit pool created by remote service units has been steadily growing.[6]

2. While a human teller is capable of handling approximately 1,300 transactions per month, each remote service unit is capable of handling approximately 6,500. Actually San Diego Federal's remote service units have consistently averaged well over 2,000, and, in most instances, well over 2,500, transactions per month. Indeed, each remote service unit handles more transactions than many of the manned offices of the association which occupy 1,000 to 1,500 square feet of floor space and require four employees to operate.[7]

3. The majority of transactions conducted through remote service units occur before or after normal business hours, suggesting that they produce business which San Diego Federal would not otherwise get at all, or would get only by maintaining extended business hours at manned facilities, thereby incurring the additional expense, and consuming the additional energy (for heat, light and air conditioning), required to maintain such extended hours.

4. Remote service units are used by a substantial number of account holders as their primary or exclusive means of transacting business with San Diego Federal.

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[6] By contrast, deposits in conventional "passbook" accounts during the comparable period have been volatile and are now rapidly declining.

[7] The daily energy consumption of a remote service unit is only a small fraction of that of even the smallest manned office.

III

ARGUMENT

A. Implementation Of The Judgment Of The Court Of Appeals In The Bank Board Appeal Nullifying The RSU Regulation Would 1) Be Inimical To The Interests Of Low Income and Minority Depositors and Other Consumers Who Rely Upon The Remote Service Units As A Medium For Transacting Business With Their Respective Savings And Loan Associations; 2) Contravene The Public Policy In Favor Of Energy Conservation; and 3) Injure Federally Chartered Savings And Loan Associations Such As San Diego Federal Which Have, At Considerable Cost, Established Remote Service Units In Reliance Upon Authority Given Them By The Governmental Agency Charged By Law With Responsibility For Regulating Their Operations.

In determining whether or not to grant the petition for certiorari, the Court should be apprised of the practical impact of denying such petition and allowing the judgment of the United States Court of Appeals for the District of Columbia Circuit in the Bank Board appeal to be implemented. As San Diego Federal shall hereinafter demonstrate, implementation of that judgment would 1) be inimical to the interests of low income and minority depositors and other consumers who rely upon remote service units as a medium for transacting business with their respective savings and loan associations; 2) contravene the public policy in favor of energy conservation; and 3) injure federally chartered savings and loan associations such as San Diego Federal who have, at considerable cost, established remote service units in reliance upon authority given them by the governmental agency charged by law with responsibility for regulating their operations.

1. *Effect Upon Consumers.*

While San Diego Federal and other federally chartered savings and loan associations would be injured by the

implementation of the judgment in the Bank Board appeal (see §III A.3., *infra*), the ones who would really suffer are the consumers.

As set forth in §II, *supra,* the experience of San Diego Federal with its "24-Hour Teller" program suggests that the primary users of automatic teller machines, including remote service units, are racial minorities, non-English-speaking persons, families in which all adult members are employed during normal business hours, one-car families, families in which one spouse is handicapped, students, and low income families generally. The result of abolishing remote service units would be to deprive these people of a useful medium for transacting business with respect to their savings accounts — perhaps, because of lack of transportation, language barriers, and other factors, the only practical medium available to them.

2. *Contravention of Policy of Energy Conservation.*

Conservation of energy is, of course, a preeminent national policy; and abolition of remote service units would clearly contravene that policy.

Remote service units are highly energy efficient. The number of transactions which are currently effected through several of San Diego Federal's remote service units actually exceed the number of transactions effected through some manned facilities which require four employees to operate; yet a remote service unit consumes only a fraction of the energy consumed by such a manned facility.

Furthermore, remote service units are often located more proximately to account holders than manned facilities, can be located in shopping centers and other places frequented by account holders for other purposes, and are accessible on a

twenty-four hour basis. Hence they permit account holders to avoid unnecessary travel, with all of the saving of energy that such avoidance entails.[8]

3. *Injury To Federal Associations.*

The injury to federally chartered savings and loan associations such as San Diego Federal would be multifaceted and substantial.

First, as of the present time federally chartered savings and loan associations have secured permission from the Bank Board to establish a large number of remote service units, and total investment of federal associations in such units is enormous. (See "Petition for Rehearing and Suggestion that Rehearing Be En Banc" in the United States Court of Appeals, p. 14.) Yet that investment would be largely lost if the judgment of the Court of Appeals in the Bank Board appeal was implemented.[9]

Second, the total pool of funds held by federal associations in accounts accessible through remote service units is now in excess of two and one half billion dollars (*Ibid*)—a pool of funds which, the experience of San Diego Federal suggests, is more stable than the general pool of deposits in passbook

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[8] While San Diego Federal and other federally chartered associations do endeavor to locate their manned facilities near account holders, there are obviously practical limitations such as space, personnel requirements, and cost upon the number of manned facilities which may be established.

[9] While certain components of the remote service installations could perhaps be salvaged, the major portion — particularly the kiosks housing the computer terminals — would probably have to be either abandoned or demolished.

Actually, San Diego Federal's own investment includes, properly speaking, not only the cost of the physical assets but also the time, money, and effort expended in planning and promoting its remote service units.

accounts, which has been growing while the general pool of deposits in passbook accounts has been declining, and which is available at a relatively favorable cost.[10] Yet if the judgment in the Bank Board appeal was implemented, a significant portion of that pool might well be lost to federal associations.

Third, the relationship between federal associations, college students, young single people, and others who in the future may be expected to be substantial savers and an important source of business over the long term may be substantially eroded.

[10] At present passbook accounts at San Diego Federal, including "passcard" accounts, bear interest at the rate of 5-1/2% per annum.

B. The Judgment Of The Court Of Appeals In The Bank Board Appeal Is Clearly Erroneous: 1) The Assertion Of The Court Of Appeals To The Contrary Notwithstanding, A "Passcard" Or Other Device Used To Effect The Withdrawal Of Funds Through A Remote Service Unit Is Manifestly Not The "Functional Equivalent" Of A Check; 2) Federal Law Explicitly Provides That The Bank Board "May By Regulation Provide For Withdrawal Or Transfer Of Savings Accounts Upon Non-Transferable Order Or Authorization"; 3) The Withdrawals And Transfers Which May Be Effected Through Remote Service Units Are Identical To Those Which May Be Effected At Manned Association Facilities; 4) Federal Law Explicitly Mandates The Bank Board To Encourage Federal Associations To Establish Remote Service Units; and 5) Remote Service Units Advance The Basic Purposes Of Savings and Loan Associations.

Another factor which this Court should consider in deciding whether or not to grant the petition for writ of certiorari is the correctness of the judgment of the Court of Appeals in the Bank Board appeal. As San Diego Federal shall hereinafter demonstrate, that judgment is clearly erroneous.[11]

1. The "Passcard" or Other Device Used to Effect the Withdrawal of Funds Through a Remote Service Unit is Manifestly Not the "Functional Equivalent" of a Check.

The sole basis upon which the Court of Appeals reversed the judgment of the District Court and ordered the Bank Board to vacate the RSU regulation is its conclusion, supported by

[11] San Diego Federal does not propose to present herein a comprehensive exposition of all of the reasons which demonstrate that the judgment of the Court of Appeals is legally unsupportable. Should certiorari be granted, however, San Diego Federal may seek leave to file a brief which addresses the merits of the appeal in greater detail.

neither authority nor analysis, that the device (in the case of San Diego Federal, a "passcard") used to effect withdrawals through a remote service unit is the "functional equivalent" of a check and that, therefore, the RSU regulation violates the prohibition against federally chartered savings and loan associations offering checking accounts contained in §5(b)(1) of the Home Owners' Loan Act of 1933, 12 U.S.C. §1464(b)(1).

The conclusion is patently untenable.[12]

Fundamentally, a check is a device by which an individual may create a right in a third party payee to withdraw funds from a demand deposit account and which confers upon such third party payee the option of transfering that right to other third parties. A "passcard" such as that employed by San Diego Federal, by contrast, is functionally nothing more than a device which permits the account holder to identify himself to his or her association in order that he or she may personally withdraw funds from his or her non-demand savings account. No rights whatsoever are conferred upon third parties.

[12] One possible explanation for the Court's commission of so obvious an error is the consolidation of the Bank Board appeal with two other appeals which involved totally different agencies, issues, and statutory schemes. San Diego Federal expresses no opinion either as to the merits of, or as to whether certiorari should be granted in, the other two appeals. It should be noted, however, that they involved, respectively, the questions of 1) whether the creation of a new type of commercial paper by federally chartered credit unions violates the Federal Credit Union Act, 12 U.S.C. §§1751-90, and 2) whether the automatic transfer of funds from an interest-bearing savings account to a non-interest-bearing demand (checking) account by a national banking association in order to maintain the demand account at a minimum level or to cover overdrafts violates the prohibition against the payment of interest on checking accounts contained in 12 U.S.C. §371a — questions which have no meaningful legal relationship to the question presented in the Bank Board appeal.

In short, characterizing a check and a device such as a "passcard" as functional equivalents is simply unsupportable.[13]

2. *Federal Law Explicitly Provides For Withdrawal Upon Non-Transferable Order.*

While 5(b)(1) of the Home Owners' Loan Act of 1933, 12 U.S.C. §1464(b)(1), states that "[s]avings accounts shall not be subject to check or to withdrawal or transfer on negotiable order or transferable order of authorization", it also explicitly states that the Bank Board "may by regulation provide for withdrawal or transfer of savings accounts upon non-transferable order or authorization". The RSU regulation is a regulation of the Bank Board which *does* provide for withdrawal of savings accounts upon a non-transferable order or authorization.[14]

[13] Moreover, the Court of Appeals failed to cite, and San Diego Federal is not aware of, any authority to support the assertion that a "functional equivalency" criterion may be applied to determine whether or not 12 U.S.C. §1464(b)(1) is in fact violated. Indeed, it is generally known that some consumers prefer to make frequent withdrawals from a savings account and then pay debts in cash instead of using a checking account; but that has never meant, nor could it conceivably mean, that such withdrawals are the "functional equivalent" of a check in violation of 12 U.S.C. §1464(b)(1).

[14] The Independent Bankers Association argued, in essence, to the Court of Appeals that, because electronic withdrawals from bank savings accounts are "check paid" under the National Bank Act (citing *Independent Bankers Ass'n of America v. Smith*, 175 U.S. App.D.C. 184, 534 F.2d 921 (D.C. Cir. 1976) *cert. denied*, 429 U.S. 862), electronic withdrawals from savings and loan association accounts are also "checks paid" under the Home Owners' Loan Act of 1933. In fact, however, the Court in *Smith* held that "*all* account withdrawals" from *all* accounts at national banking associations, *including savings accounts*, were "checks paid" (534 F.2d 944; emphasis added.) If the rationale of the *Smith* case was applicable to federally chartered savings and loan associations, therefore, it would mean that *all* withdrawals from accounts at federal savings and loan associations, *whether or not through remote service units*, would be unlawful — an obviously absurd conclusion.

3. *Withdrawals That May be Effected Through Remote Service Units are Identical to Those Which May be Effected at Manned Association Facilities.*

As set forth in §II, *supra,* the transactions that may be effected through remote service units under programs such as San Diego Federal's "24-Hour Teller" program are all within the universe of transactions that may be, and historically have been, performed at manned savings and loan association facilities. All that the remote service unit does is to provide a new communications medium by which the transaction may be effected.[15]

Indeed, implementation of the judgment of the Court of Appeals would create the anomaly in which an automatic teller — by definition a device that functions without human assistance — located *on* the premises of a manned facility could and would lawfully function, whereas a remote service unit which operated in exactly the same manner and during exactly the same hours and which performed identical functions would be unlawful merely because it was located other than in conjunction with a manned facility of the association.[16]

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[15] Indeed, savings and loan associations have traditionally permitted account holders to effect transactions through the mails or by a combination of the mails and telephonic communications. Would a Court of Appeals conclude that a mailed communication or a telephonic communication was also the "functional equivalent" of a check?

[16] In *Independent Bankers Ass'n of America v. Smith, supra,* the Independent Bankers Association of America contended that substance should govern over form and that, therefore, the identical legal consequences should attach to electronic and manual withdrawals from accounts. In the instant case, however, the Independent Bankers Association of America has reversed its position and is arguing, in effect, that form should govern over substance and that different legal consequences should attach to a transaction depending upon whether it is performed through a remote service unit or on the premises of manned facilities.

4. *Congress has Mandated the Bank Board to Allow For the Development of Electronic Transfer Systems Such As Remote Service Units.*

In 1978, Congress enacted, passed as Title XX to the Financial Institutions Regulatory and Interest Rate Control Act of 1978, the Electronic Fund Transfers Act, 15 U.S.C. § 1693. It mandates the Board of Governors of the Federal Reserve System, in consultation with the Bank Board, to "take into account, *and allow for,* the continuing evolution of electronic banking services and the technology utilized in such services" and to carefully analyze "the availability of such services to different classes of consumers, particularly low income consumers." (15 U.S.C. §1693(a)(1) and (2); emphasis added.) The RSU regulation carries out that mandate, making available to low income consumers and other classes of individuals convenient and efficient savings and loan facilities which might otherwise be denied to them.

5. *Remote Service Units Advance the Basic Purposes of Federal Savings and Loan Associations.*

The purpose of federal savings and loan associations was declared by Congress to be the provision of "*local* mutual *thrift* institutions in which people may invest their funds in order to provide for *financing* of homes. . . ." (12 U.S.C. §1464(a); emphasis added). As more localized facilities are provided through the relative ease of placement of a small, highly efficient electronic machines, savings and thrift are encouraged among all classes of consumers; and the stable deposit pool of money available for home financing is thereby increased.

IV

CONCLUSION

The petition for writ of certiorari should be granted.

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